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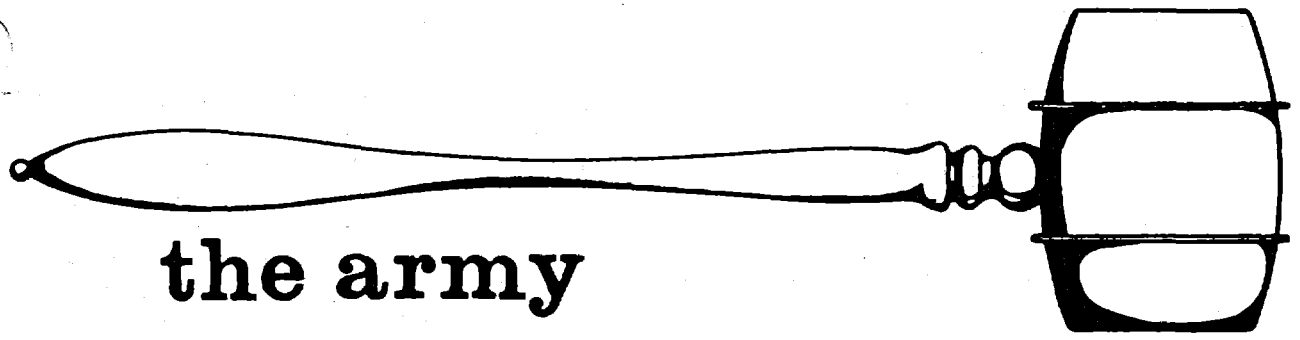

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Minor Symposium on Federal Civilian Labor Relations: Introduction

This edition of The Army Lawyer includes two articles on federal labor relations subjects. The first of these deals with the past practices doctrine, and the second with picketing of military installations by civilian employees of the government.

Although the federal labor relations program is on the verge of major reorganization (see Army Lawyer, May 1978, 37-38), the anticipated changes will be largely procedural and should have no significant effect on the substantive discussion in either labor law article.

The Past Practices Doctrine in Federal Labor-Management Relations

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Newly assigned installation commander to Civilian Personnel Officer:

> "I see our civilian employees are taking a twenty minute coffee break in the morning and another twenty minute break in the afternoon. I don't think that much time off is necessary—are these breaks authorized?"

Civilian Personnel Officer:

"Yes, sir. The regulations authorize up to an hour off per day for rest breaks."

Installation Commander:

"Are we *required* to give them the breaks?"

Civilian Personnel Officer:

"Well, not by regulation, but they've been taking the breaks for years. There may be some legal problems with the union if we just cut them off. . . we'd better have the SJA see if there's anything in our contract."

This dialog illustrates an aspect of federal labor-management relations that can be troublesome for all commands where federal employees are unionized: the effect of past personnel practices on command prerogative.

I. General Scope of the Doctrine

From a maze of highly technical collective bargaining requirements in federal labor relations law,[1] a "past practices" doctrine of required negotiation and contract interpretation has emerged that bodes ill for unwary managers.[2] Under this federal labor relations doctrine, unofficial or informal concessions from command representatives on discretionary civilian personnel policies can lead to the establishment of employee rights that restrict those commands when they later seek to change or abolish the informally established policies. If the facts indicate actual or constructive acceptance of the informal practice by its representatives, a command may find itself as bound to continue with the practice as it would under a clause in the collective bargaining agreement (CBA).

This type of restriction on management rights may occasionally be due to a willingness to penalize loose management practices, but more often reflects the bona fide attempt of an arbitrator or administrative law judge to determine the intent of management in allowing the personnel practice to become established. Analogous with the equitable doctrine of laches or the real property doctrine of adverse possession, the past practices doctrine penalizes lack of diligence in the enforcement of management rights. The loss of rights by a failure to exercise them is a fairly fundamental concept, but understanding how the past practices doctrine applies requires familiarization with some of the more technical facets of the federal labor relations program.

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Basic familiarity with the past practices doctrine of federal labor-management relations will enable staff judge advocates to better identify the potential legal issues involved when proposed command decisions would change civilian personnel policies, and to channel research of the labor issues to the designated labor counselor[3] before legal opinions are finalized.

Civilian personnel policies, practices, and working conditions often develop informally and are expressly or tacitly accepted by management representatives at local commands without being formally expressed in collective bargaining agreements (CBA) or local regulations. Occasionally informal or customary work policies may be justifiable and necessary for the details of day to day operations and variances in shop room exigencies, but most informal personnel policies develop either as *ad hoc* substitutes for procedures that should be formally spelled out and agreed upon by management and employee representatives, or as the result of supervisors misinterpreting the language of the CBA.[4]

Commands should be aware of the possibility that employee representatives may seek to institute or enlarge job related benefits by gaining additional concessions from low level supervisors, after such concessions have been rejected by management's official representatives at the bargaining table. First line supervisors are frequently less aware of potentially adverse management effects, and more sensitive to morale-enhancing, pressure techniques such as union "whip-sawing" (They're doing it over there, why can't we do it here?"). Often, conciliatory supervisors incorrectly assume that their informal concessions may be revoked at will, or managers may be unaware of how well established the practice has become.

Training of supervisors by the management Employee Relations Section of the Civilian Personnel Office, with timely advice on contract administration from the local labor counselor, should minimize the unintentional establishment of personnel practices at the installation level. The following paragraphs describe the two situations where the past practices doctrine will be applied by federal labor relations authorities, explain the effects of applying the doctrine, and conclude with a synopsis of illustrative cases.

II. Application of the Doctrine

Past employment practices can influence the outcome of two types of federal labor-management disputes: grievances, at arbitration over differing interpretations of the CBA,[5] and unfair labor practice complaints, at hearings before administrative law judges and the Assistant Secretary of Labor for Labor-Management Relations (A/SLMR).[6] These two types of disputes are settled by totally separate processes[7] that will be briefly explained in the remainder of this article, but in resolving both situations the past practices doctrine can be pivotal if three preconditions are proven:

1. The command-management has acted through local regulation, announcement, memorandum or other means, to change some informal personnel policy, practice or working condition that

2. has become pervasive ("established") in the group of federal employees represented by the union, and such informal practice

3. has at least implicitly been sanctioned or approved by responsible command representatives after becoming "established."[8]

Even where these three conditions exist, however, there is an important limitation on the use of the past practices doctrine: the doctrine may not be used to defeat clear provisions of applicable statutes, agency level regulations, executive order, or the CBA itself.[9] To understand how the establishment of informal personnel practices can lead to loss of managerial authority over unionized federal employees—both at the bargaining table and in local contract administration—it is necessary to have a basic familiarity with both bargaining obligations and grievance arbitration in the federal sector.

III. The Effect of Past Practices On Bargaining Requirements

Under current bargaining requirements, representatives of installation commanders must bargain with representatives of federal civilian employee unions on *all* matters having a significant effect on personnel policies, practices and working conditions *except* where reserved by (1) applicable laws, agency level regulations for which a compelling need exists, (2) specified, traditional management rights, and (3) party agreement in the CBA.[10] The obligation to negotiate and the application of the past practices doctrine are both subject to the controls of law, agency (DOD and DA) level regulation, Executive Order, or the CBA.[11] Thus, what are left to the bargaining discretion of commands below Department of Army level are usually personnel policies and practices that are not specifically covered or required by higher authority, including "impact bargaining" on local methods for implementing required personnel policies.[12]

The obligation to negotiate "matters affecting personnel policies. . ." means required bargaining on matters with a material effect or substantial impact on personnel policy. The obligation is usually triggered by some personnel-related change that is sought by either the union or management.[13] Changes sought by the union are inevitably designed to expand employee benefits. Management changes may be for expansion or restriction of benefits; but, as a practical matter, the union will pursue negotiations only where a possible loss of benefits is perceived.

The past practices doctrine is usually applied in the context of an unfair labor practice complaint alleging that management has unilaterally implemented some new policy, procedure or working condition that curtails or restricts an established practice, without affording the union an opportunity to negotiate in advance on the change.[14] If existing past practices are consist with higher authority but the facts do not clearly indicate "establishment" of the past practice, management's position before the administrative law judge usually will be that the practice has not been "established" and the *union* is prematurely attempting to turn a *de facto* personnel procedure into an established practice without negotiating. Conversely, the union will attempt to show that the *de facto* personnel practice has in fact already become established and management is seeking to impose the unilateral change by enforcing an expired rule.

What constitutes an "established practice" for negotiability obligations is a question of factually determining whether or not there was a "meeting of the minds." However, express, unconditional approval of a policy or practice by responsible management supervisors outside the negotiation team can be equated by labor authorities with instant establishment that will require negotiation before the policy can be retracted.[15] Absent express approval, a meeting of the minds and "establishment" may be shown by such variables as passage of time, management acquiesence, and the consistency of the practice.[16]

In a March 1978 case involving the Ogden Service Center of the Internal Revenue Service,[17] the Federal Labor Relations Council clarified the relationship of past practices to the bargaining obligation, once the CBA has expired. The Council first reiterated the well-established rule that the contracting parties may not unilaterally change established personnel policies and practices (unless illegal or the changes are waived in the CBA) without first giving the union notice and an opportunity to negotiate:

> Thus it is clear that the obligation to negotiate, as set forth in section 11(a) of the Order, requires both parties during the term of an agreement to maintain established personnel policies. . . whether or not such terms are incorporated in such agreement, unless and until they are modified in a manner consistent with the Order.[18]

Remanding the Assistant Secretary of Labor decision, the Council then stated:

> In our view, existing personnel policies

> and practices and matters affecting working conditions, whether or not they are included in a negotiated agreement, *continue as established* upon the expiration of a negotiated agreement absent an express agreement . . . or unless modified in a manner consistent with the order.[19] (Emphasis added.)

The Council concluded its opinion in *Ogden Service Center,* with a reaffirmation that (1) past practices (whether established in the CBA or not) must give way to agency-level, compelling need regulations; (2) that management retains the right upon expiration of the agreement to unilaterally change provisions in the contract relating to permissive, section 11(b) subjects, and (3) that management changes in past practices may be implemented after a legitimate bargaining impasse has been reached if the union has not sought assistance from the Federal Services Impasses Panel after a reasonable time.[20]

One clear message in *Ogden Service Center* for command representatives is that the safest way to avoid unwanted continuation of an established past practice is to provide specifically for expiration of the unwritten practice in the original contract, in mid-contract negotiations or in renegotiations. Obviously, a discontinuation provision will not easily be included if the union considers the past practice to be desirable.

Thus, in order for past civilian personnel practices to be relevant to negotiations with the exclusive representative labor organization, the requisite conditions must exist: the personnel practice must be a legally permissible command option not specifically controlled by the CBA; the practice must be "established" or pervasive in the unit; and it must be at least tacitly acknowledged by management. The command may not change lawfully established personnel practices without committing an unfair labor practice, unless (1) the union is given notice of the change and declines to request negotiations,[21] (2) the parties have negotiated to impasse and the union has not sought the assistance of the FSIP,[22] or the impasse is resolved in favor of management by the FSIP,[23] (3) the practice has become illegal by changes in applicable laws and regulations,[24] (4) the union has specifically agreed to termination of the practice in the CBA,[25] or (5) the change has *no substantial impact* upon existing personnel policies practices or working conditions.[26] In the usual case, the union will not freely give up an established personnel practice without gaining something in return, and will hold out for impasse resolution procedures.

IV. The Effect of Past Practices on Grievance Arbitration

All CBA's executed in the federal sector must include a grievance procedure for settlement of issues that arise under the contract and that are not controlled by statutory procedures.[27] Virtually all grievance procedures provide for binding arbitration as the final step in the grievance resolution, and most grievances involve differences between employees and the command over how CBA language should be interpreted.[28] In rendering awards under a CBA grievance procedure, arbitrators are considered to speak for the agency head.[29] Past personnel practices are considered by arbitrators as a kind of parole evidence rule for construing ambiguous contractual language in the CBA, or, where there is no relevant language, to determine the intent of the parties.[30]

In their often cited reference on grievance arbitration, *How Arbitration Works,* Elkouri and Elkouri state:

> Unquestionably custom and past practice constitute one of the most significant factors in labor-management arbitration. Evidence of custom and past practice may be introduced for any of the following major purposes: (1) to provide the basis of rules governing matters not included in the written contract; (2) to indicate the proper interpretation of ambiguous contract language; or (3) to support allegations that clear language of the written con-

tract has been amended by mutual action or agreement.[31]

Past practices should not be considered where the language of the contract is specific and unambiguous,[32] but inconsistent enforcement of rights by management will affect an arbitrator's determination of the appropriate remedy, even where management rights have been clearly set out in the contract.[33] Attempts by arbitrators to reach "underlying issues," beyond the scope of the submission agreement, sometimes result in past practices being considered even where no ambiguity exists in the contractual language.[34]

For tactical purposes, it is the author's conclusion that arbitrators require more evidence of the "establishment" of a past practice than do administrative law judges (ALJ's) who focus on the question of compliance or noncompliance with the lawful bargaining obligations. The essential question for both ALJ's and arbitrators considering past practices should be: "Was the practice established and accepted by both management and the employees in place of the recognized procedure or policy?"

At arbitration hearings labor counselors may find it useful to limit consideration of past practices by respectfully reminding arbitrators that they are limited to deciding the issue(s) jointly agreed upon and presented by the parties in the submission statement, and that the parties should not be permitted to achieve through arbitration what they were unable to achieve at the bargaining table.[35] In filing briefs for consideration by administrative law judges hearing unfair labor complaints, labor counselors would do well to point out any applicable reasons for considering or disregarding alleged past practices by referring to the same "party intent" considerations that would govern an arbitrator hearing.

Because arbitrators derive their authority from the CBA, the existence of a CBA is a prerequisite for invoking arbitration. However, it is important to remember that in most cases established personnel practices will survive an expired contract and will require grievance arbitration or negotiation for changes, and that the practices are terminated only by express language in a new contract, by the establishment of a superseding personnel practice, or by a change in law or "compelling need" regulation.[36]

Grievances can usually be continued to arbitration during or after the expiration of the CBA, so the arbitrator's application of the past practices doctrine is usually not affected by the expiration of the CBA. In those situations where there is no CBA and no agreement on grievance procedures, federal employees use the Civil Service grievance procedures,[37] which do not include arbitration. Where there must be a past or present contractual base to invoke arbitration and consideration of past practices by arbitrators, past practices are relevant to unfair labor practice proceedings involving the command obligation to negotiate changes even where there is no CBA.

V. Cases Illustrating The Application of The Past Practices Doctrine

When the command at U.S. Army Finance and Accounting Center, Ft. Benjamin Harrison, Indiana, issued a memorandum attempting to curtail an existing practice that allowed tardy employees to take annual leave or make up their time during break periods, the Administrative Law Judge and A/SLMR concluded as a matter of law that the past practice was an established condition of employment, and refused to allow the unilateral change by the command.[38]

At Ft. Richardson, Alaska, there was an unwritten management policy of allowing all nonessential, nonemergency civilian personnel to leave work early when inclement weather required base closure. After such a closure was announced, the Directorate of Facility Engineers determined that most of its civilian employees were "essential" for snow removal, contrary to the past practice of designating lesser numbers of employees as essential. It was held that management had an absolute right to close the base, but committed an unfair labor practice by acting without first negotiat-

ing the procedures for determining who were "essential" personnel.[39]

Recently, many state National Guards have been ordered to adopt contractual language allowing wear of civilian clothing by technicians performing military duties, due in part to allowance of such clothing in the past.[40]

At Vandenberg Air Force Base, management checked on employee sign-out requirements only thirty percent of the time during 1977, but that was held sufficient to rebut an employee's claim that the sign-out requirements had deteriorated into a practice of not signing out.[41]

Occasional use of government secretaries and typewriters to prepare employee grievances and a union newsletter was recently held to be nonrevocable by management, where the practice was not concealed and had persisted over a period of years.[42]

Other examples of management conduct that resulted in consideration of the past practices doctrine at arbitration or unfair labor practice hearings are:

1. The CBA provides that "reasonable" amounts of official time will be granted for employees acting as union representatives on employee-related matters. Local management then sets guidelines more restrictive than those followed in the past.[43]

2. The union is allowed use of facilities, utilities, long distance phone service, or parking privileges without specific provision in the CBA.[44]

3. The CBA provides "discipline shall be for just cause," and a grievance is filed alleging management's punishment was more severe than for like offenses in the past.[45]

4. Employee clean-up time is permitted before leaving work.[46]

5. Hours of work and tours of duty are allowed to vary by mutual understanding (numbers and types of employees not affected).[47]

6. Management allows employees to perform work away from their normal job site.[48]

7. Management changes the competitive areas of a reduction in force.[49]

8. Management discontinues issuance of optional safety equipment.[50]

9. Management curtails environmental differential pay based upon it's belief that employees are no longer entitled to the extra pay (under contract language referring to FPM requirements for the extra pay).[51]

Some informal practices have served as management shields rather than union swords. In the notorious Mare Island "Rat Patrol" case,[52] the local command issued a memorandum announcing that spot checks would be made by supervisors to determine employee productivity levels. The union unfair labor practice charge was dismissed because the facts showed the memorandum to be only a reaffirmation of an already existing policy and no changes actually occurred.

VI. Conclusion

The past practices doctrine can bind subagency level commands only to the limits of their local discretion. The most firmly established informal practice must give way when there is a conflict with applicable law, agency regulation, or Executive Order. Yet the doctrine can result in loss of significant managerial authority through inadvertant foreclosure of local prerogatives.

In exceptional cases, informal local personnel practices may provide needed flexibility for local personnel managers who know of the practices and build in appropriate limitations. But as a rule, the informal practices are vested unintentionally and passed on, like the sins of a careless father, to succeeding commanders who suffer from varying losses of command options. Undesirable past practices usually weaken the command bargaining position at formal negotiation sessions, because previously optional trade-off benefits become enforceable expectancies (to be changed only by statute, union consent or third party impasse procedures). Allowing informal command practices and employee concessions to become established may

also have an adverse influence on management when employee grievances are arbitrated.

Staff judge advocates should be alert for the civilian personnel issues in all command decisions. Labor counselors, civilian personnel specialists and other responsible staff members should determine the existence of all local civilian personnel policies, practices and working conditions which are not provided for by regulation or CBA. If such informal practices are already "established," but inconsistent with laws or compelling need regulations, the illegal practices should be immediately curtailed, and union representatives should be given immediate notice and an opportunity to bargain on any collateral effects of the curtailment that are negotiable. If the established, informal practice is legally permissible but undesirable for the command, negotiations should be requested on desired changes. If the established, informal practice is beneficial to management, it may still be preferable to formalize the practice by regulation or directive. In the latter case, there is no requirement to bargain on mere formalization, but advance notice to the union and an opportunity to bargain on any impact of the formalization will be required.

Footnotes

[1] Exec. Order No. 11,491, 3 C.F.R. 861 (1966–1970 Compilation), *reprinted in* 5 U.S.C. § 7301 (1976), *as amended by:* Exec. Order No. 11,616, 3 C.F.R. 605 (1971–1975 Compilation); [hereinafter cited as Exec. Order No. 11,491]; Exec. Order No. 11,636, 3 C.F.R. 634 (1971–1975 Compilation); Exec. Order No. 11,838, 3 C.F.R. 957 (1971–1975 Compilation); Exec. Order No. 11,901, 41 Fed. Reg. 4807 (1976); and Exec. Order No. 12,027, 42 Fed. Reg. 61851 (1977). The order has been interpreted and applied in approximately two thousand reported decisions of the authorities administering the federal labor-management relations program. Under the President's Reorganization Plan No. 2 of 1978 (*see* THE ARMY LAWYER, MAY 1978, at 37–38) and pending legislative proposals (Civil Service Reform Act of 1978, H.R. 11,280, 95th Cong., 2d Sess., title VII; a bill to reform the civil service laws, S. 2640, 95th Cong., 2d Sess. (1978)) the Executive Order would be replaced by legislation and certain functions of existing program authorities would be consolidated in a Federal Labor Relations Authority. The proposed changes include mandatory binding arbitration for all negotiated grievance procedures and arbitration of many statutory appeals systems that currently are not arbitrable. These changes would have no significant effect on the application of the past practices doctrine by the new program authorities.

[2] "Agency management" means the agency head and "all management officials, supervisors, and other representatives of management at any level, having authority to act for the agency on any matters relating to the implementation of the agency labor-management relations program. . . ." Section 2(f), Exec. Order No. 11,491, *supra* note 1. According to a decision of the Assistant Secretary of Labor for Labor-Management Relations, actions by managers at any level may be the basis for an unfair labor practice under § 19 (a) of the order. Federal Aviation Administration, Oklahoma City, A/SLMR No. 1047 (1978).

[3] The Army's Labor Counselor Program was established in July 1974. *See* DAJA-CP 1974/8342, 15 July 1974. The National Guard Bureau inaugurated their Labor Advisor Program in June 1977. *See* NGB Letter, subject: National Guard Judge Advocates as Labor Advisors to the Technician Personnel Officer, 24 June 1977.

[4] *See, e.g.*, United States Army Finance and Accounting Center, Fort Benjamin Harrison, Indiana, A/SLMR No. 651 (May 19, 1976), and Department of Defense, Lackland Air Force Base, A/SLMR No. 468 (1974). Misinterpretation of contract language can be minimized by close contact between management negotiators and unit supervisors during and after negotiations. The Gov't Mgr. (BNA) No. 141, at 4.

[5] *See generally* F. ELKOURI and E. ELKOURI, HOW ARBITRATION WORKS, 389–393 (3d ed. 1974).

[6] *See, e.g.*, Naval Weapons Station, Concord, California, A/SLMR No. 1020 (Apr. 13, 1978); Naval Air Rework Facility, Pensacola, Florida, A/SLMR No. 608 (Jan. 26, 1976); and Department of Defense, Lackland Air Force Base, A/SLMR No. 468 (1974).

[7] Unfair labor practices complaints under Section 19, Exec. Order No. 11,491, *supra* note 1, are filed, investigated and settled pursuant to the A/SLMR procedural rules in 29 C.F.R. 293 (1975). Arbitration procedures are established by individual arbitrators within the framework of general guidelines for arbitration set out in the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes (1974), approved by the American Arbitration Association, the National Academy of Arbitrators and the Federal Mediation and Conciliation Service.

[8] These three requirements reflect the clear consensus of commentators writing on the influence of past practices in arbitration decisions. *See, e.g.*, F. ELKOURI AND E. ELKOURI, HOW ARBITRATION WORKS 390–393 (3d ed. 1974) and O. FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 171–172 (1973). *See also* Cox and Dunlop, *The Duty to Bargain Collectively*

During the Term of an Existing Agreement, 63 HARV. L. REV. 1097, 1116–117 (1950). Perhaps the best discussion of the use of past practices by arbitrators, with illustrative cases, is in P. PRASOW & E. PETERS, ARBITRATION AND COLLECTIVE BARGAINING 78–121 (1970). PRASOW AND PETERS stress that the essence of the past practice doctrine is that there must be an underlying mutuality of intent to allow the practice before the practice can be considered to be binding.

[9] F. ELKOURI AND E. ELKOURI, *supra* note 7, at 395-297; P. PRASOW AND E. PETERS, *supra* note 7, at 95–110.

[10] Section 11 (a) of Exec. Order No. 11,491, *supra* note 1, establishes the general scope of bargaining obligation for all matters affecting personnel policies, practices, and working conditions, subject to applicable laws and regulations (agency regulations must be supported by compelling need).

Section 11(b) provides:

> . . . The obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices. This does not preclude the parties from negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change.

Section 12(b) provides:

> Management officials of the agency retain the right, in accordance with applicable laws and regulations—
>
> (1) to direct employees of the agency;
>
> (2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees;
>
> (3) to relieve employees from duties because of lack of work or for other legitimate reasons;
>
> (4) to maintain the efficiency of the Government operations entrusted to them;
>
> (5) to determine the methods, means, and personnel by which such operations are to be conducted; and
>
> (6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency. . . .

Under Section 4 of the order, each of these provisions is subject to interpretation and application by the Federal Labor Relations Council. A recent case illustrating these limitations under the order (in the context of contract termination) is Internal Revenue Service, Ogden Service Center, A/SLMR No. 806; and Department of the Treasury, Internal Revenue Service, Brookhaven Service Center, A/SLMR No. 859, FLRC Nos. 77A-40 and 77A-92 (Rep. No. 147, Mar. 23, 1978). The Council decisions were implemented by A/SLMR Nos. 1052 and 1053 (May 22, 1978).

[11] *Id. See also* Department of Defense, A/SLMR No. 465 (1974).

[12] *See, e.g.*, EPA, Region III, A/SLMR No. 949 (1978) and DoD Lackland Air Force Base, A/SLMR No. 468 (1974). *Compare* U.S. Army Europe and Seventh Army, and Army and Air Force Exchange Service, Europe, A/SLMR No. 1006 (1978); and Social Security Administration, A/SLMR No. 979 (1978); and Naval Weapons Station, Concord, California, A/SLMR No. 1020 (1978). Without attempting a full discussion of the scope of bargaining (SOB) required, it may be helpful for nonspecialists to consider the following formula for analysis of the negotiability of particular proposals or local actions affecting civilian employees:

SOB + section 11 (a) minus (−) (Applicable laws and compelling need, agency level regulations + Case law interpreting Sections 11 (b) and 12 (b) + Provisions in the CBA)

+ impact bargaining + past practices.

[13] *See, e.g.*, Department of the Treasury, Internal Revenue Service, Brookhaven Service Center, A/SLMR No. 814 (1977); Naval Air Rework Facility, Pensacola, Florida, A/SLMR No. 608 (1976), and Department of the Air Force, Vandenburg Air Force Base, California, A/SLMR No. 935 (1977).

[14] *Id.; but compare* Social Security Administration, Singleton, Texas, A/SLMR No. 982 (1978).

An *opportunity* to bargain is all that management must provide the union. *See, e.g.*, U.S. Customs Service, Houston, Texas, A/SLMR No. 1961 (1978).

[15] *See, e.g.*, IRS, Western Region, A/SLMR No. 473 (1975). Leniency by one of several supervisors should be distinguished from widespread management acquiescence. *See* UNIVAC, 54 LA 48 (1969). Two grants of exceptional parking privileges did not mature into an established parking practice in National Archives and Records Service, A/SLMR No. 1055 (1978). *See also* Headquarters, U.S. Army Material Development and Readiness Command, A/SLMR No. 994 (1978).

[16] *Supra* note 7.

[17] Internal Revenue Service, Ogden Service Center, and Brookhaven Service Center, FLRC Nos. 77A-40 and 77A-92 (Rep. No. 147, March 23, 1978). In applying the principles enunciated by the Council, the A/SLMR found on remand that no change in the results of his original decisions was necessary. A/SLMR Nos. 1052 and 1053 (1978).

[18] *Id.* at 7.

[19] *Id.* at 7.

[20] *Id.* at 11-12.

[21] Social Security Administration, Singleton, Texas, A/SLMR No. 982 (1978); U.S. Department of Air Force, Norton Air Force Base, A/SLMR No. 261 (1973).

[22] IRS, Ogden, *supra* note 16, at 10, and U.S. Army Corps of Engineers, Philadelphia District, A/SLMR No. 673 (1976), *as distinguished* in IRS, Ogden, *supra* note 16; *review denied*, FLRC No. 76A-94 (Rep. No. 122, March 25, 1977).

[23] IRS, Ogden, *supra* note 16, and section 11(a), Exec. Order No. 11,491, *supra* note 1.

[24] IRS, Ogden, *supra* note 16.

[25] *Id.*

[26] Department of Transportation, A/SLMR No. 939 (1977) and Texas Air National Guard, A/SLMR No. 738 (1976).

[27] Exec. Order No. 11,491, *supra* note 1, section 13(a).

[28] Section 13(b) of the order provides for binding arbitration and the Federal Services Impasses Panel has expressed a preference for this method of grievance resolution. Department of the Navy, Jacksonville, Florida, and Local 2453, AFGE, Case No. 71 FSIP-20 (April 26, 1972). Section 13 of the order also requires the negotiated grievance procedure to be the executive procedure available to represented employees. If a clear breach of a contractual obligation is established, the unfair labor practice procedures of the A/SLMR may be appropriate. Otherwise—where interpretation of the CBA language is at issue—grievance procedures and arbitration will be the method for resolving the dispute. *See Newark Air Force Station*, A/SLMR No. 677 (1976); NASA, Kennedy Space Center, A/SLMR No. 223 (1972), and A/SLMR Report No. 49 (15 February 1972).

[29] 54 Comp. Gen. 312, 316 (1974).

[30] P. Prasow and E. Peters, *supra* note 7, at 98-198; F. Elkouri and E. Elkouri, *supra* note 4, at 390-397, and Duriron Co., [1968] 51 Lab. Arb. Rep. (BNA) 185.

[31] F. Elkouri and E. Elkouri, supra note 4, at 389-90.

[32] *Id.*

[33] P. Prasow and E. Peters, *supra* note 7 at 101-109. It has been noted that periodic enforcement may be as much a practice as periodic lapses. [1978] 70 Lab. Arb. Rep. (BNA) 66.

[34] Sometimes the ambiguity exists in the issue as it is framed and submitted to the arbitrator, rather than in the CBA. In United States Forest Service and AFGE, FLRC No. 75A-4 (March 18, 1976), the arbitrator went beyond the submitted issue and considered the spirit and intent of the whole contract as the "underlying issue that necessarily arose from the grievance." Management exceptions to the award were rejected by the Council on the basis that the submission statement was broad enough to allow the award.

[35] *See* Code of Professional Responsibility for Arbitrators of Labor Management Disputes, *supra* note 6, at 10.

[36] Internal Revenue Service, Ogden Service Center, and Brookhaven Service Center, FLRC Nos. 77A-40 and 77A-92 (Rep. No. 147, Mar. 23, 1978).

[37] 5 C.F.R. Part 771.

[38] U.S. Army Finance and Accounting Center, Fort Benjamin Harrison, Indianapolis, Indiana, A/SLMR No. 651 (1976).

[39] Directorate of Facility Engineers, Fort Richardson, Alaska, A/SLMR No. 946 (1977) (*citing* Naval Public Works, Norfolk, Virginia, FLRC No. 71A-56).

[40] Massachusetts National Guard, 77 FSIP 18 (Release No. 87, Dec. 28, 1977); Montana Air National Guard, 77 FSIP 22 (Release No. 90, Jan. 19, 1978); Kansas Army National Guard, 77 FSIP 30 (Release No. 93, Feb. 15, 1978). ("FSIP" means Federal Service Impasses Panel. Citations such as "77 FSIP 18" are case numbers used to identify individual releases, reports, and other documents.) *See also* Michigan National Guard, 77 FSIP 33 (1978); New Jersey National Guard, 77 FSIP 47 (1978); and South Carolina National Guard, 77 FSIP 26 (1978); and New York Army National Guard, A/SLMR No. 44 (1974). *But compare* Ohio National Guard, 77 FSIP 36 (Release No. 79, Apr. 6, 1978). The "compelling need" argument for exempting National Guard haircut regulations from negotiability has been rejected by the Federal Labor Relations Council. *See, e.g.*, FLRC No. 77A-106 (Rep. No. 143, Feb. 28, 1978).

[41] Department of the Air Force, Vandenberg Air Force Base, California, A/SLMR No. 935 (1977).

[42] U.S. Department of the Treasury, Internal Revenue Service, New Orleans District, A/SLMR No. 1034 (1978).

[43] Watervliet Arsenal. U.S. Army Armament Command, Watervliet, New York, A/SLMR No. 726 (1976).

[44] *See, e.g.*, A/SLMR letter with regional administrator's decision (Case No. 22-07786 (CA), May 16, 1977).

[45] Tests used by many arbitrators for "just case" determinations are set out in Moore's Seafood Products, Inc., 50 LA 83 (1968).

[46] U.S. Army Finance and Accounting Center, Fort Benjamin Harrison, Indianapolis, Indiana, A/SLMR No. 651 (1976). *Compare* Department of the Treasury, U.S. Customs Service, Boston, Massachusetts, FLRC No. 78A-9 (Rep. No. 148, Apr. 3, 1978).

[47] U.S. Army Corps of Engineers. Philadelphia District, A/SLMR No. 673 (1976); *Pet. for review denied*, FLRC No. 916 (1977). *See also* Portsmouth Naval Shipyard, A/SLMR No. 820 (1977).

[48] IRS, New Orleans, A/SLMR No. 995 (1978).

[49] Picatinny Arsenal, Dover, New Jersey, A/SLMR No. 981 (1978), Department of the Army, Ft. Monmouth, New Jersey, A/SLMR No. 919 (1977).

[50] Veterans Administration Hospital, Sheridan, Illinois, A/SLMR No. 940 (1977).

[51] In Portsmouth Naval Shipyard and Federal Metal Trades Council, FLRC No. 77A-66 (Rep. No. 140, December 30, 1977), a past practice of granting environmental differential pay (as an interpretation of the general CBA language) was initiated by a grievance settlement and perpetuated informally for two years before curtailment by management. The union grieved and the arbitration award reinstated the payments. The Council denied review. *Compare* Naval Air Rework Facility, Pensacola, Florida, FLRC No. 76A-37 (Rep. No. 125, June 2, 1977).

[52] Mare Island Naval Shipyard, Vallejo, California, A/SLMR No. 736 (1976). Cessation of administrative time allowed employees to prepare rebuttals to performance evaluations was allowed as a continuation or reaffirmation of existing requirements in Department of Transportation, St. Louis, Missouri, A/SLMR No. 961 (1978). *See also*, Pennsylvania National Guard, A/SLMR No. 969 (1978), *pet. for review denied*, FLRC 78A-18 (June 26, 1978); A/SLMR Letter 1119, dated May 5, 1978, re: Department of the Air Force, McClellan Air Force Base, California (Case No. 70-5810), Alabama National Guard, A/SLMR No. 895 (1977); FLRC No. 77A-115 (Rep. No. 144, Mar. 2, 1978); and United States Army School Training Center, Ft. McClellan, Alabama, A/SLMR No. 42 (1970).

The Right of Federal Civilian Employees to Picket a Military Installation: Does It Exist?

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Federal civilian unions are firmly entrenched in the government today and are having an impact on the formulation of personnel policies, practices, and working conditions which affect federal employees. Executive Order 10988, signed by President Kennedy in 1962 officially authorized federal civilian employee unions and laid down basic ground rules for labor relations in the federal service. The original executive order has been replaced and is presently implemented by Executive Order 11491.[1] Executive Order 11491, as amended, clearly sets forth the basic guarantee to all federal civilian employees of their right to form, join, and assist a union, and grants the union the right to bargain collectively and secure redress of grievances on behalf of the civilian employees it represents in the bargaining unit. This Executive Order has frequently been called the "Magna Carta" of federal labor relations.

Recently, there has been much controversy over the issue of picketing by federal employees. The interpretation of section 19(b) (4) of the Executive Order has become the focal point of this issue. Section 19 (b) (4) of the Order makes it an unfair labor practice (ULP) for a labor organization to "Call or engage in a strike, work stoppage, or slowdown; picket a Government agency in a labor-management

dispute; or condone any such activity by failing to take affirmative action to prevent or stop it." The language of section 19 (b) (4) read literally clearly proscribes and prohibits federal employees from picketing a federal agency. Since the inception of federal unions in 1962, section 19 (b) (4) has been given this interpretation. In 1976, the Federal Labor Relations Council (FLRC), the ruling body which interprets and administers the executive order, decided that section 19 (b) (4) of the order clearly prohibits *all* picketing of an agency by a labor organization in a labor-management dispute.[2] However, only a year later, in January 1977, the FLRC reevaluated their position by issuing a major policy statement which redefined the rights of federal civilian employees to engage in informational picketing.[3] The FLRC established a new test to be applied on a case-by-case basis in determining whether informational picketing is permissible or impermissible.

This article examines this new test and the criteria promulgated by the FLRC. This article also addresses the legal issues which surround this controversial subject in order to develop a proper perspective and understanding of informational picketing by civilian employees and its impact on the federal sector and military installations.

Since the Council's statement, federal labor unions have exercised their right to engage in informational picketing more often. It is highly probable that military installations will be confronted with a picket line composed of federal civilian employees in the near future. Thus, it is important that installation commanders be aware of their legal responsibilities and obligations in responding to picket line activity.

This article discusses the procedural requirements that must be followed in processing an unfair labor practice complaint and how the installation labor counselor[4] works with the civilian personnel specialist as a team in order to advise the installation commander in this labor-management relations context.

I. Informational Picketing

The National Treasury Employees Union (NTEU) initiated the litigation which resulted in expansion of the picketing rights of federal civilian employees. The facts surrounding this legal action between NTEU and the Internal Revenue Service were as follows: In 1975 an impasse had been reached in the negotiation of their collective bargaining agreement which resulted in NTEU picketing IRS Service Centers in Kentucky and New York. The picket signs related to the labor-management dispute, and the picketing was for the purpose of informing the public and IRS employees of the NTEU's position regarding that dispute. The picketing was peaceful, had no "signal" effect on those wishing to enter the Centers and did not in any manner interfere with the operation of the Centers. The IRS filed an unfair labor practice complaint against NTEU alleging a violation of section 19 (b) (4) of the executive order.

The NTEU argued that their picketing was purely informational in purpose and effect and as such was a form of free speech protected by the first amendment. However, the Assistant Secretary of Labor for Labor-Management Relations (A/SLMR)[5] ruled that "the language of section 19(b) (4) is so clear and unambiguous that only a literal interpretation is justified, i.e., that all picketing in a labor-management dispute, including informational picketing, is prohibited by the Order."[6] Consequently, the Assistant Secretary held that the NTEU picketing at the IRS Centers was unlawful, in violation of section 19 (b) (4); and he ordered the union to cease and desist. The FLRC affirmed the Assistant Secretary's decision and NTEU decided to take its case to federal court and argue the constitutionality of section 19 (b) (4).[7]

II. District Court Decision

Judge Gerhard Gesell of the U.S. District Court for the District of Columbia heard the arguments of the government and NTEU in the case at bar and the court defined the major issue as determining the government's interest

in banning picketing, and balancing that interest against the employees' right to free expression. Judge Gesell ruled in *National Treasury Employees Union v. Fasser*[8] that while there were some circumstances in which a ban on picketing might be warranted, an absolute ban on all forms of picketing by federal employees "is overly broad and violates the First Amendment when improperly applied."[9] Accordingly, he overruled and vacated the order by the Assistant Secretary directing NTEU to cease and desist from picketing the IRS.

Judge Gesell cautiously avoided ruling that section 19 (b) (4) of Executive Order 11491 was unconstitutional. Rather he held that the section 19 (b) (4) ban was applied in this particular case in a manner that infringed upon IRS employees' constitutional rights.[10] The court decided that a dividing line between constitutionally permissible and nonpermissible types of picketing could not be drawn "by the use of such vague terms as 'informational' or 'noninformational' picketing."[11] Rather, the court suggested that the Federal Labor Relations Council may, if it chooses, develop a more precise standard to apply to picketing in the future and promulgate new guidelines to distinguish constitutionally-protected picketing from that which the government may regulate.

III. FLRC Major Policy Statement

On January 5, 1977 the Federal Labor Relations Council announced in a major policy statement that picketing which "does not actually interfere or reasonably threaten to interfere with the operation of the affected government agency. . . will be found permissible under Section 19 (b) (4) of the Executive Order 11491."[12] In addition, the Government at this time decided to withdraw its appeal from the *Fasser* decision. The FLRC policy statement was made in response to the recommendation by Judge Gessel in the *Fasser* ruling that the FLRC set up guidelines on picketing so that federal civilian employees' first amendment rights would not be violated by the absolute ban on picketing that is contained in section 19 (b) (4).

The FLRC decided not to attempt to delineate the "myrid circumstances"[13] in which picketing could occur and describe ahead of time which sorts of picketing would be permissible. Instead, the Council ruled that the Assistant Secretary of Labor could continue to process unfair labor practice complaints which alleged a section 19 (b) (4) violation. The Council would then distinguish permissible from impermissible picketing on a case-by-case basis. "In this connection," the FLRC ruled, "the Assistant Secretary shall fully develop in the record and carefully consider the precise government interest sought to be protected and such matters as the sensitivity of the governmental function involved, the situs of the picketed operation, and number of pickets, the purpose of the picketing, the conduct of the pickets, and any other facts relevant to the exact nature of the picketing and the government organization concerned"[14] before rendering his decision on its permissibility.

IV. Current Trends

The Assistant Secretary of Labor recently articulated and clarified the scope of permissible picketing activity in two informational picket-line cases. In *Joint Council of Customs, NTEU*,[15] the U.S. Customs Service filed an unfair labor practice complaint, alleging a violation by NTEU in the union's picketing of Customs at O'Hare Airport, Chicago, Illinois.

The picketing engaged in at O'Hare by NTEU was to inform the public of the problems NTEU was experiencing over the negotiation of a new agreement with the U.S. Customs Service. The picketing was conducted on public property and did not interfere with the operations of Customs. Nor did it interfere with the ingress or egress of the general public to the premises or with any deliveries or any other normal operations on the premises. On these facts, the Assistant Secretary of Labor found that the picketing met the definition of "permissible picketing" established in the Council's *Statement on Major Policy Issue*[16] and ordered that the unfair labor practice complaint be dismissed in its entirety.[17]

The second decision to be rendered on this topic was in *Norfolk Naval Shipyard.*[18] The unfair labor practice complaint filed by the Department of the Navy alleged that the Tidewater Virginia Federal Employees Metal Council, AFL-CIO, violated section 19 (b) (4) by improperly sponsoring and directing picketing of the Navy at access gates to the Norfolk Naval Shipyard.

The evidence established that the picketing was informational in nature since it was for the purpose of informing the union's members of its labor-management dispute with the Navy. The picketing was peaceful and caused no interference with the operation of the shipyard or deliveries.

As in the Customs case at O'Hare, the Assistant Secretary of Labor concluded that "permissible informational picketing in Federal sector labor-management disputes is that which is directed at the general public, including members of organized labor groups, and which does not interfere or reasonably threaten to interfere with the operation of the affected government agency."[19] Thus, the Assistant Secretary held that the union's informational picketing fell within the Council's definition of "permissible" picketing under section 19(b) (4) of the order and ordered the complaint dismissed.[20]

V. Department of The Army Policy On Picketing

Department of the Army policy is that *no picketing* is permitted on the premises of a military installation.[21] However, informational picket lines may be established at the access gates of a military installation. When the installation commander determines that prohibited picketing (i.e., a section 19 (b) (4) violation) involving employees or labor organizations representing DA employees is threatened or actually occurs, HQDA must be notified immediately by telephone.[22] It is, therefore, incumbent upon the installation commander to ascertain what the facts are surrounding the labor-management dispute. Most picketing by federal employees will probably be done in connection with a contract dispute when an impasse or deadlock results at the bargaining table. Department of Defense Directive 1426.1 sets forth some specific guidelines for a commander to follow in responding to picket line activity.[23]

First, when it comes to the attention of the commander that picketing by federal civilian employees may occur, the head of the local labor organization (union president) should be apprised of the situation. Either the labor counselor or the civilian personnel specialist can accomplish this task. Coordination with union officials is the most crucial element in allaying the tensions of the moment. The lines of communication between the union and the commander must remain open during the labor dispute. The union should be advised of the informational picketing standards enunciated by the Council so that if picketing does occur the union will be aware of its responsibilities in conducting a picket line within the permissible guidelines[24] and hopefully comply.

If for some reason the picketing does not conform to the Council's standards, it may become necessary to file an unfair labor practice complaint. Prior to proceeding against a labor organization under section 19(b)(4) of the order and filing an unfair labor practice complaint, it will be necessary to establish first, that members of the labor organization are participating or have participated in a prohibited act, and second, that the prohibited act was ordered, approved or authorized by a responsible official of the labor organization, or that, when apprised of participation by its members in the prohibited act, the responsible labor organization official did not take prompt steps to disavow the act and order members to cease their participation.[25]

The "prohibited act" is picketing line conduct violative of section 19(b)(4) of the order which falls within the purview of the Council's test as being picketing which "will interfere with or present a reasonable threat of interference with the operations" of the installation. The burden of proof is on the government to show the effect that picketing has on the operations

of the installation. Therefore, it is vitally important that the activity of the picket line be monitored and its affect on the operations of the installation be well-documented.

The labor counselor and civilian personnel specialist can best perform their function by ensuring that the facts are fully articulated and documented and that they support the government's decision to file an unfair labor practice complaint against the union. The facts presented to the Assistant Secretary of Labor should clearly establish the detrimental impact that the picketing has had on the operations of the installation. During the picketing, management officials (supervisors) or the military police should be assigned to record and monitor the picket-line activity[26] in order to buttress the legal position of the government.

A viable argument can be made on behalf of the government that picketing which results in the curtailment or disruption of deliveries to the installation is no longer protected informational picketing. If the reason for nondelivery was a refusal to cross a picket line, a memo for record would be made with the following information: (a) the amount of undelivered property, (b) the dollar value of the undelivered property, (c) when delivery was expected, (d) how the delivery was expected to be made and (e) why the delivery was not made.

A picket-line log should also be established to record day-to-day events of the picketing. Statements of witnesses should be handwritten or typed and checked by the witness for accuracy immediately after transcription. They should be signed by the witness, dated and made at the time of the events or conversations, or *immediately* thereafter. Besides witnesses, the government may introduce documents, picket signs, and photographs of the picket line activity as evidence in an unfair labor practice proceeding. Consequently, the foregoing picket-line log and any other relevant documentation should be safeguarded.

The commander should also issue an instruction to the federal civilian employees during the labor-management dispute that employees are required to report to work as scheduled, i.e., to be present at their prescribed time and place of work—unless specifically excused (e.g., annual leave or sick leave).[27] Federal civilian employees are not permitted to engage in picketing activity during official duty time. Employees who picket while on duty should be advised that they are subject to disciplinary action for being absent without leave.

VI. UNFAIR LABOR PRACTICE PROCEDURES

Prior to the filing of an unfair labor practice complaint against the union, the installation commander must promptly notify and consult with Headquarters, Department of the Army on the matter.[28] This procedure has the effect of shifting the final decision to file an ULP complaint from the installation commander to higher headquarters. Assuming that a firm legal and factual foundation exists for the specific allegation of a section 19(b)(4) violation, i.e., the picketing does in fact interfere with or presents a reasonable threat of interference with installation operations, and HQDA approval is granted for the filing of a ULP complaint with the Department of Labor, then the following procedures should be utilized.

Among the Assistant Secretary of Labor's rules and regulations are special procedures which provide for the expeditious resolution of complaints that section 19(b) (4) was breached. Upon receipt of a section 19(b) (4) complaint the Department of Labor will assign an administrative law judge to hold a hearing within 24 hours to decide whether there is "reasonable cause to believe that a section 19(b)(4) violation is occurring."[29] If he so finds, he shall issue an order which provides for cessation of the alleged violative conduct pending disposition of the complaint.[28] The complaint is then heard within 48 hours of the issuance of the administrative law judge's opinion by the Labor Department's Chief Administrative Law Judge, who decides whether or not the allegations of the complaint have been proven by a "prepon-

derance of the evidence."[29] Thus, the standard of proof is entirely different in the two proceedings. Ultimately, the Chief Administrative Law Judge's findings, conclusions and recommendations can be reviewed by the Assistant Secretary of Labor who makes a determination as to whether the union should be ordered to cease and desist from the picketing and take affirmative action to stop and prevent any such picketing of the installation.[30]

VII. CONCLUSION

If federal civilian employees should picket a military installation in conjunction with a labor-management dispute, the installation labor counselor and civilian personnel specialist can render valuable assistance to the commander by ensuring that the FLRC test is scrupulously applied. The trend today is that informational picketing will be presumed to be permissible and the government has the burden of proving that it was not permissible. Hopefully, litigation in the future will provide clearer guidance as to the scope and limitations of informational picketing in the federal sector and the responsibilities of the union and the government in exercising and protecting their rights in this controversial area. Only by keeping abreast of the new decisions of the Assistant Secretary of Labor and the Council on this subject and working as a "labor relations team" can the labor counselor and civilian personnel specialist assist the commander in accomplishing his mission and protecting the installation from interference with its operations by federal employee picketing.

Footnotes

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[1]3 C.F.R. § 254 (1974) *As amended by* Exec. Order No. 11838, 40 Fed. Reg. 5743 (1975), entitled Labor-Management Relations in the Federal Service.

[2] National Treasury Employees Union and Internal Revenue Service, Department of Treasury, FLRC Case No. 75 A-96 (Mar. 3, 1976). The Federal Labor Relations Council is composed of three members, the Chairman of the Civil Service Commission who also serves as Chairman of the Council, the Director of the Office of Management and Budget, and the Secretary of Labor.

[3]Statement of Major Policy Issue (Government Employee Picketing), FLRC Case No. 76 P-4 (Jan. 5, 1977). For an analysis of the Council's policy statement, see Ostan, *The Right of Federal Civilian Employees to Picket: Confusion and Controversy*, 29 LAB. L.J. 219 (1978).

[4]In July 1974 The Judge Advocate General of the Army and the Director of Civilian Personnel, Office of the Deputy Chief of Staff for Personnel, established a "labor counselor" program in which Judge Advocate General's Corps officers and civilian attorneys were to advise and assist local civilian personnel officers and their staffs. *See* DAJA-CP 1974/8342, 15 July 1974. This program has found a regulatory basis in a civilian personnel regulation which provides:

> The Installation Labor Counselor, a qualified attorney designated by the activity, is available to provide advice and assistance to the civilian personnel officer on matters such as union contacts involving attorneys, third-party proceedings, grievance resolutions, arbitration, representation, legal advice to negotiation committee, contract interpretation, management training (including instructor assistance), and review of labor relations policies and procedures.

See Civilian Personnel Regulation, CPR-700, ch. 711.A, subch. 1, para. 1-5C (18 Mar. 1975).

Policies and instructions for their implementation have been issued to labor counselors by the Office of the Judge Advocate General in Dep't of the Army, Labor Counselor Bulletin No. 6, 3 Aug. 1978. Para 1 of this bulletin concerns all types of picket lines at entrances to military installations, with emphasis on documentation of the facts concerning secondary boycotts, if any. Para. 2 deals with picket lines of federal civilian employees at military installations. This paragraph states that picketing *on* a military installation is not permitted, but that informational picketing may be conducted at installation access gates. Para. 3 sets forth the "reserve gate plan," intended for use primarily when a union strikes a government contractor working on a military installation. According to this plan, the contractor will be required to use only one specified gate, and other contractors and suppliers and their employees will be prohibited from using that gate. The striking union can then be required to limit its picketing to that one gate.

[5]Under section 6 of the executive order, the Assistant Secretary of Labor-Management Relations (A/SLMR) is responsible for deciding unfair labor practice complaints.

[6]A/SLMR No. 536 (July 29, 1975).

[7]National Treasury Employees Union and Internal Revenue Service, Department of Treasury, FLRC Case No. 75 A-96 (March 3, 1976).

[8]428 F. Supp. 295 (D.D.C. 1976).

[9]*ID.* at 300.

[10]The court offered the following rationale to support their decision:

> There is no doubt that the Government can prohibit picketing which actually interferes with its operation. Stopping the disruption of Government service justifies an incidental limitation on First Amendment freedoms. Executive Order 11491 can constitutionally prohibit any picketing, whether or not peaceful and informational, that actually interferes or reasonably threatens to interfere with the operation of the affected Government agency. The question here is whether under the Constitution the Government can bar *ALL* picketing simply because some picketing may properly be subject to restraint. . . . But surely not all Government activity, at all Government offices, requires such broad protection from peaceful picketing. Picketing that is strictly informational, and limited in place and focus, does not in all situations create the probability of interference with Government functions sufficient to justify the limitations on free speech involved here.

Id. at 298-99. *See also* American Radio Assn., AFL-CIO v. Mobile Steamship Assn., Inc., 419 U.S. 215 (1975) and Teamsters Union v. Vogt, Inc., 354 U.S. 284 (1957).

[11]428 F. Supp. at 299.

[12]Statement on Major Policy Issue (Government Employee Picketing), FLRC Case No. 76 P-4 (Jan. 5, 1977).

[13]*Id.*

[14]*Id.*

[15]National Treasury Employees Union, Chapter 162, NTEU: Chapter 172, NTEU; and Joint Council of Customs Chapters, NTEU; A/SLMR No. 811 (Mar. 24, 1977).

[16]State on Major Policy Issue (Government Employee Picketing), FLRC Case No. 76 P-4 (Jan. 5, 1977).

[17]National Treasury Employees Union, Chapter 162, NTEU; Chapter 172, NTEU; and Joint Council of Customs Chapters, NTUE; A/SLMR No. 811 (Mar. 24, 1977).

[18]Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO, (Norfolk Naval Shipyard), A/SLMR No. 867 (July 21, 1977).

[19]*Id.*

[20]*Id.* The Norfolk Naval Shipyard appealed the Assistant Secretary's decision to the Federal Labor Relations Council. The Navy asked the Council for a ruling which, the Navy hoped, would have permitted an absolute ban on picketing at a facility with a "critical" and "sensitive" national defense function, such as the Navy considers itself to have at the Norfolk shipyard. The Council refused to review the Assistant Secretary's factual conclusion that the Norfolk shipyard was not a facility with so critical or sensitive a mission that no picketing could be permitted. *See* Tidewater Virginia Federal Employees Metal Trades Council FLRC No. 77A-93 (Dec. 20, 1977). *See also* GERR No. 471 at 28 (Jan. 9, 1978).

[21]Generally, pickets are excluded from a military installation to avoid disruption of necessary military activities or adverse impact upon other business activities (private contractors) unrelated to the labor dispute between the federal labor union and the installation. In Greer v. Spock, 424 U.S. 828 (1976), the United States Supreme Court addressed the constitutionality of an installation regulation which prohibited demonstrations, *picketing*, sit-ins, protest marches, political speeches and similar activities on the post. In that case, candidates for the offices of President and Vice-President of the United States had been denied permission to enter the Fort Dix, New Jersey, Military Reservation, for the purposes of distributing campaign literature and discussing election issues with service personnel. The Court upheld the constitutionality of the challenged regulation and found that the regulation had not been improperly applied. Mr. Justice Stewart delivered the opinion of the Court in *Spock* and stated in forceful language that:

> A necessary concomitant of the basic function of a military installation has been the historically unquestioned power of (its) commanding officer summarily to exclude civilians from the area of his command . . . .

Id. at 838. Also:

> There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline or morale of troops on the base under his command.

Id. at 840.

See also Dep't of Defense Directive No. 1354.1, Relationships with Organizations Which Seek to Represent Members of the Armed Forces in Negotiation or Collective Bargaining (6 Oct. 1977) and Army Regulation No. 600-80, Relationships with Organizations Which Seek to Represent Members of the Army in Negotiation or Collective Bargaining (3 Jan. 1978) for prohibitions relating to union activity by military personnel. For a discussion of DoD Directive No. 1354.1, *see* Siemer, Hut, and Drake, *Prohibition on Military Unionization: A Constitutional Appraisal*, 78 MIL. L. REV. 1 (1977).

[22]Civilian Personnel Regulation, CPR-700, ch. 711.A. subch. 1, para. 1-11d (18 Mar. 1975).

[23]Dep't of Defense Directive No. 1426.1, Labor-Management Relations in the Department of Defense (9 Oct. 1974) [hereinafter cited as DoD Dir. No. 1426.1].

[24] Para. F([2])(b)(1) of DoD Dir. No. 1426.1, which concerns resolution of labor management disputes, provides the following:

> When information reaches the head of a DoD activity that an official of a labor organization with members employed at the activity has indicated that such members may or will engage in an act prohibited by section 19(b)(4) of Executive Order 11491, or when it is apparent that employees are actually engaging in such an act, an appropriate representative of the activity of DoD component involved will immediately seek to contact the head of the local labor organization and apprise him of the situation. If the head of the labor organization disavows or withdraws any threatening statements and there is no evidence that the organization ordered, approved or authorized a prohibited act, and if prompt steps are taken by the organization to disavow any such act and order its members to cease their participation, no further action will be taken against the organization.

[25] DoD Dir. No. 1426.1, *supra* note 23, para. F(2)(a).

[26] Aspects of activity to be recorded include the location of the picketing, numbers of people involved, and duration and nature of the picketing activity. Descriptions of the nature of the activity should include mention of whether the activity was peaceful or otherwise, what language was on the picket signs, and whether there was any interference with ingress to or egress from the installation.

[27] In accordance with DoD Dir. No. 1426.1, employees should also be given the following notification:

> Employees who, in entering or leaving their assigned work location, encounter interference or harrassment on the picket line of a *sufficiently serious nature to arouse concern for their personal safety* are required to immediately phone their supervisor from the nearest available location. Arrangements will be made either to escort the employees safely through the picket line or, if that is not immediately feasible, to excuse the employees from duty until safety can be restored.

[28] *See* note 22 *supra*. *See also* DoD Dir. No. 1426.1 para. F(2)(b)(2).

[29] *See* 29 C.F.R. § 203.7 (b) (1976), A/SLMR Rules and Regulations.

[30] *Id.*

[31] *Id.*

[32] *See* 29 C.F.R. § 203.26 (1976).

Role of the Deputy Staff Judge Advocate

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The position of deputy staff judge advocate has been much maligned. Lawyers new to the military view it as the level where a lawyer ceases to practice law and becomes an administrator (or worse). Those JAGC captains with six or seven years experience may have a more sophisticated appreciation of the position requirements, but often do not consider it an attractive job because of the prevalent perception that the deputy has little authority or responsibility. Finally, some senior military lawyers who have not had SJA experience often lack management skills or experience in utilizing a deputy, and so reflect an attitude of indifference or even confusion toward the role of the deputy.

The purpose of this article is to analyze the position, discuss some of the common problems encountered, and suggest how a deputy can make the greatest contribution. I have recently completed an assignment as the deputy staff judge advocate of the Second Infantry Division. My thoughts on this subject have been greatly influenced by that worthwhile experience. I hope this article will stimulate a new appreciation and discussion of the position.

I. RELATIONSHIP BETWEEN SJA AND DSJA

Any analysis of the deputy's role must start with discussion of the relationship with the SJA. At least initially, the SJA will define the job based on his own experiences. He likely served as deputy earlier in his career and may have developed strong opinions of the job based

on how he was used or misused. Additionally, where the SJA has served in other SJA positions, the experiences of working with other deputies may dictate his view of the relationship. Regardless of these previously established working patterns, however, the professional strengths and weaknesses and personalities of both officers ultimately will be the major factors in defining the deputy's job. For example, if the SJA enjoys visiting commanders and staff, the deputy should stay in the office to insure that all assigned tasks and missions are completed on time. On the other hand, the SJA may see his place at his desk closely supervising the daily operation of the office. In determining how he will respond to the work habits of the SJA, the deputy should follow the old management maxim, that a subordinate should do best what his boss likes to do least.

II. ESTABLISHING THE DEPUTY ROLE

While the relationship between the SJA and deputy is largely a matter of prior experiences and personalities, there are standard management concepts that should be applied. The deputy must be prepared at any time to assume the duties of the SJA. Whether because of illness, leave, or official business, the SJA is often absent for a period of days or even weeks. These absences will require an informed deputy aware of the cases and actions that must be processed. Also, the deputy must occasionally participate as the SJA representative at staff and committee meetings, and he must develop a good working relationship with the Commander, the Chief of Staff, and headquarters staff. The deputy who develops the confidence of commanders and staff will be filling his job properly. At all times, though, he should remember he is not the SJA. Temporary SJA absences do not mean that major office policies are changed, or controversial opinions rendered, if they can wait until the SJA returns. Nor should the deputy attempt to "outshine" the SJA during these absences. The deputy must be loyal to the SJA at all times if they are to work together effectively.

The deputy should have the responsibility of supervising the daily operation of the office, including personnel problems, office administration and reviewing all completed actions, whether signed by the SJA or another officer. This frees the SJA to concentrate his efforts on providing advice to the senior commander and his staff. The SJA who is accustomed to involvement in all aspects of the office operation may feel uncomfortable sharing his supervisory responsibilities, but other demands on his time dictate the deputy make as many management decisions as possible.

III. THE DEPUTY's MANAGEMENT RESPONSIBILITIES

I have suggested the deputy should "run the office," but what does this entail? I see three major areas of responsibility: personnel management, office administration, and work product review. Personnel management includes involvement in the multitude of personnel problems that can arise in an office with a large staff, and the administration of policies and procedures which will affect these individuals. The most critical decisions, such as officer assignments, will be made by the SJA, but he will not have time to deal personally with the less important personnel problems.

Although the deputy's role will require constant involvement, he must fully utilize the subordinate supervisors who have the initial authority to solve personnel problems. These immediate supervisors should be able to expect that both the SJA and the deputy will avoid interfering with the relationship the supervisor has established with his subordinates. For this reason the deputy should not, except in unusual circumstances, correct or reprimand without first discussing the particular problem with the immediate supervisor.

Even though the deputy should not usurp his supervisors' responsibilities, he should become

familiar with the work of all office personnel. To assist him in learning the role of each individual, an office SOP must list the required tasks for each position. The interest the deputy shows in the work of all personnel will likely be reflected in higher morale and efficiency. Whether military or civilian, officer or enlisted, there is a positive response from subordinates when they sense his concern about their work. Encouraging communication within the office also serves to prevent minor irritants or misunderstandings from becoming major problems. It is particularly important that the deputy have time available for counseling and advising the military lawyers. The deputy may assist in solving difficult legal questions by sharing his knowledge and experience with those seeking his help.

Counseling is also required when conduct and efficiency do not meet acceptable standards. Whether this counseling is conducted by the SJA, the deputy, or direct supervisor, it must be handled with firmness and should be timely. Most people prefer frequent appraisal of their performance rather than being told at the end of an official rating period that their work is considered substandard. The deputy should attempt to set a tone for fairness in handling disciplinary problems. When supervisors appear unreasonable, efficiency declines. The deputy's role is to make sure that neither personality conflicts, nor ineffective supervision interfere with the office mission.

Managing people is an important aspect of the deputy job, but unless the administration of the office is sound, the most competent employee will be inefficient. The need for a current and practical SOP cannot be overemphasized. This SOP should not only list the individual tasks to be performed by each person, but must also establish the procedures to follow when handling both routine and unusual actions, and should include a compilation of standard forms and letters frequently used. With the constant personnel changes found in a military legal office, a well-conceived SOP provides not only the structure, but also the institutional memory that is so necessary to expeditiously perform the required legal work.

The movement of the legal actions through the office is the responsibility of the warrant officer or the senior noncommissioned officer. This individual must meticulously check all work leaving the office for proper format, punctuation, and spelling, and more importantly must monitor all suspenses to insure work is completed in a timely fashion. The deputy must work closely with this admin technician to establish a procedure that minimizes the number of administrative errors, yet also provides a support system that allows the lawyer to spend maximum time and effort on legal research, analysis, and presentation. To meet this goal the office must possess modern word processing equipment, a current library and a facility which creates the professional atmosphere conducive to quality legal work. The deputy and the admin technician must utilize the budget process and their creative talents to establish a smoothly functioning office.

But while managing people and administering the paper flow through the office are important, they are not "lawyer's" jobs. It is the third major area of the deputy's responsibilities - work product review - that requires the training and legal knowledge of an experienced lawyer. With perhaps a few exceptions in the area of military justice (e.g., matters dealing with the defense counsel/SJA relationship, such as pre-trial agreements and discharge pending court-martial charges), all actions to be signed by the SJA or for the SJA, should first be reviewed by the deputy. This procedure has several advantages. First, it lends additional support to the position or answer proposed by the action officer and branch chief, if the deputy has had the opportunity to ask hard questions and challenge the analysis. He is serving in the role of "devil's advocate", challenging and testing to make sure an opinion is well developed and legally sound. At the same time, checking the details and the legal reasoning will likely protect the less experienced officer from embarrassing mistakes identified by the SJA, a

commander, or staff section. Secondly, this review is consistent with the training responsibility of the SJA. Inexperienced lawyers will develop their skills more rapidly when required to present their actions for review to a deputy who has set high standards of professional excellence.

A third reason for the deputy to conduct this review is it provides him with the day-to-day knowledge of the office work product (whether it be legal assistance letters, approved claims, or military justice statistics) which is required for him to properly manage the office. More importantly, it allows him to remain informed on all actions so that he can provide the necessary advice during periods when the SJA is absent.

The fact the deputy reviews the actions does not mean they must be seen in draft format—that will be determined by many factors, such as the type of action, the experience and competency of the action officer and branch chief, and the wishes of the SJA. In whatever form the review is made, however, it should be conducted as a learning tool to develop the less experienced officer, and to make sure the quality of the office work remains high. Details must be checked and reasoning challenged if this review is to be more than merely another step that slows the processing time of the action. The more critical the review, the more careful the action officer will likely be in submitting a "final product." Attention to detail should be part of this review, but the deputy must not make changes for the sake of change—this only frustrates subordinates.

IV. COMMON PROBLEM AREAS

This discussion has emphasized an active and broad role for the deputy. Hopefully, this model will assist in creating a smoothly operating legal office with few difficulties or crises. But even the most well organized and managed organization will face problems and demands that test both its structure and its people. There are some common problems that each deputy will encounter. Because of the heavy volume of actions that must be reviewed, for example, it is a major effort to identify errors of form and substance. Even the most experienced lawyers make mistakes, so the deputy's scrutiny is critical. Time must be found for more than a cursory review.

Personnel turbulance is another problem that constantly creates difficulties within the office. Although the present Army policy of lengthening assignments has partially alleviated this situation, the continuing requirement to train new people remains. Even those with prior experience in the same or similar jobs will need an initial period to adjust to office procedures and policies. It is important that sufficient guidance and support be provided to make this transition quickly and smoothly. The deputy should make a special effort to introduce the new military lawyer to the office work and social environment.

The deputy position that has been described is both demanding and responsible. If an individual is to succeed in the job, he must be organized and should have the ability to shift concentration quickly from one subject to another. If the claims, legal assistance, administrative law decisions, and various military justice questions are to be promptly reviewed, periods of the day must be found when this time-consuming, but all-important, function is performed. Hours beyond the normal duty day are often required, but the professional satisfaction and growth to be gained make the time well spent.

V. CONCLUSION

I have suggested that the job of deputy staff judge advocate is neither understood nor popular. It must be recognized, however, that the positions will be filled. Those who receive the assignment should view it as a great professional challenge. The opportunity to be involved in all aspects of the military practice of law should be a refreshing change, particularly if the career pattern of specialization has been

previously followed. Supervising other military lawyers and their work is a learning experience that will be invaluable in the later stages of the deputy's career. The individual who seeks maximum responsibility and performs with enthusiasm, dedication, and skill will find the job rewarding. His contribution to the office should ultimately be reflected in timely and sound legal support provided to commanders and staff.

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INTERNATIONAL LAW—THE ROLE OF THE LEGAL ADVISER, AND LAW OF WAR INSTRUCTION

*Major James A. Burger, Chief, International Law Division, The Judge Advocate General's School, Charlottesville, Virginia**

Two articles of particular importance to the judge advocate officer interested in the law of war have appeared in the January-February issue of the *International Review of the Red Cross*. The first is by G.I.A.D. Draper on the "role of the legal advisers in armed forces."[1] The second is by Lieutenant Colonel Frederic de Mulinen, and is entitled "The Law of War and the Armed Forces."[2] Both articles address significant developments in the law of war.

First, there is the article by G.I.A.D. Draper. Colonel Draper is an old friend of the JAG Corps and has visited the School on a number of occasions. He served as a Senior War Crimes Prosecutor for Great Britain following the Second World War, and is now a Professor of Law at the University of Sussex in England. He is a consultant to the International Committee of the Red Cross and is a frequent publicist on law of war matters. In his article he notes the new provision of the Protocols to the Geneva Conventions of 1949 on the employment of legal advisers by military commanders.[3] This is a new requirement. It was not contained in the 1949 Conventions.

G.I.A.D. Draper traces the development of this new provision from Article 1 of Hague Convention No. IV of 1907 which required that belligerents "issue instructions" to their armed forces.[4] He says that this resulted in the appearance of "Manuals" issued by States. The second stage of development came with the requirement in the Geneva Conventions of 1949 that the Contracting Parties disseminate the text of the conventions and include their study in programs of military and, if possible, civilian instruction.[5] This is a progression from the requirement that there be Manuals to a requirement that there be programs of instruction.

The third stage comes in the new Protocols. Article 82 provides that:

> The High Contracting Parties at all times, and the Parties to the Conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level of the application of the Conventions and of this Protocol and on the appropriate instruction to be given to the armed forces on this subject.[6]

Colonel Draper states that he feels this provision, though modest, to be practical, and that the presence of legal advisers will be a valuable modality for implementation of the Conventions and Protocol I.

Colonel Draper notes two problems in fulfil-

ling this new obligation. The first is the problem of having the trained legal personnel available. It should not be a problem for nations like the United States which have large resources of qualified legal personnel, but for other nations it may be a problem. Yet, Colonel Draper feels that most States do have legal advisers available for disciplinary matters, and the requirement is not unreasonable.

The second problem is one of acceptance. Colonel Draper states that in totalitarian regimes legal advisers may be no more than a smoke-screen for persistent illegality. Even the Gestapo had its "doctors of law." But, more perplexing is negligence in this regard by democratic countries. He cites the case of *Ireland v. the United Kingdom*, decided by the European Commission of Human Rights in 1976,[7] a case involving allegations of torture in the interrogation of prisoners in Northern Ireland. Strangely, no legal advice seems to have been sought by any of the Government agencies involved.

Part of the problem of acceptance may be solved by legal advisers being able to speak the same language as their commanders and being able to understand their problems. They must also be a permanent part of their staff so that they are integrally involved in planning and operations. Then, there is the level at which they will be placed. Colonel Draper says legal advice should not be so much the over dramatized "Do we launch a weapon on that target or not", but an involvement on a level where plans and tactical directives can be reviewed before the engagement.

The legal adviser must be involved in this "vetting" of plans and directives in time of peace as well as in war. He should also be a part of exercises on any large scale. He should be attached at crucial levels of command, and he should monitor all directives and standing instructions as a matter of routine. Then, there is also the duty to advise on and be involved in instruction.

Colonel Draper summarizes the duty of the legal adviser under Article 82 to: 1) advise commanders upon the general application of the Conventions of the Protocol, 2) advise commanders in time of armed conflict upon those parts which deal with military operations, and 3) upon the instruction to be given in the armed forces on these instruments.[8]

He says that there is plenty of work to be done both in training the needed personnel and in getting them involved in the areas where they are needed. Colonel Draper is very hopeful that this new implementation provision will be of some consequence. He says that the use of legal advisers "may give the Conventions and the Protocols a significance and a relevance in armed conflict" which has not up to this time been otherwise achieved.[9]

The second article concerns the training to be given in armed forces on the law of war.[10] It follows in reasonable progression after the article by Colonel Draper. The author, LTC de Mulinen, is also a friend of The JAG School. He works for the International Red Cross and is presently assigned duties with the Institute of Humanitarian Law at San Remo, Italy. In this capacity he has been the prime mover behind the International Law of War Course for Officers being given at that Institute. He also has had the opportunity to visit the JAG School in May of 1978 to lecture and describe his efforts on law of war training.

In his article Colonel de Mulinen notes that armed conflicts as well as the rules governing armed conflict are becoming more and more complex. He believes therefore in the need to establish priorities, and methods for creditable teaching. He writes that:

> Men trained to do battle and ready if need be to lay down their lives in the accomplishment of military duty do not wish to be encumbered with regulations which to their minds are just fanciful theories propounded by jurists with no idea of military realities.[11]

The problem he addresses then is similar to what Colonel Draper was concerned with when he spoke about the acceptance of the role of the legal adviser.

Colonel de Mulinen notes first that members of the armed forces are more likely to accept ideas put forward if the expressions used are familiar to them. The legal adviser must talk in military language. Secondly, it is helpful to establish priorities. The soldier is more likely to accept those rules he feels he needs to know to do his particular job. Some priorities are outlined in the Conventions. There are some rules which are more important than others, and some rules which apply to specific categories of persons such as chaplains or medical personnel. Then, there are priorities which must be spelled out according to specific levels and functions of military duty.

He describes a table of priorities according to specific levels. This table had been previously outlined at the European Red Cross Seminar on Dissemination of Knowledge of the Geneva Conventions held at Warsaw in March 1977.[12] The list runs through what is needed to be known by privates, NCO's, and by officers from the level of lieutenants to division commanders and higher. He also suggests a list of soldiers' rules, simple rules which he feels should be known by every soldier.[13]

In regard to teaching methodology he distinguishes what he calls "teaching to convince" from "teaching properly so called." The one is oriented to making the soldier believe what is being taught and the other deals with the application of specific rules. Both must be accomplished if law of war training is to be effective. They may be accomplished by books, lectures or films, or by incorporation into exercises or the actual performance of duty.

In regard to teaching to convince, Colonel de Mulinen cites some of his experience from his course in San Remo. He notes that the students gather together in small groups to apply the rules to specific problems. He gives as an example what he calls a "Dual Action Exercise: Alpha-land at War with Betaland."[14] He proceeds through an actual tactical exercise where law of war problems are raised as the exercise is carried out. He did, I might add, carry out such an exercise while he visited at The JAG School in May. This exercise was a great success. It is a method of teaching which involves the students in the problem being presented.

One last effort noted by Colonel de Mulinen is that his Institute carried out some practical "tests"[15] to verify how well the laws of war could be carried out on the battlefield. A war game was played on a mock terrain with soldiers, tanks and civilians in between. Quite frankly, Colonel de Mulinen and his coworkers did find difficulties in applying the rules. Yet, more than anything else this proved that the problems of how to apply the rules must be addressed before the battle takes place.

Both of these articles are well worth reading. They represent two developments in the law of war which are of worldwide concern. The Draper article indicates that the new Protocols to the Geneva Conventions will require that more be done in regard to legal advice and training than has been done in the past. American judge advocates need to take note of this. The de Mulinen article shows what others are doing elsewhere in the world in regard to training on the law of war. This is also something which is well worth considering in regard to our own training programs.

Footnotes

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[1]G.I.A.D. Draper, "Role of Legal Advisers in Armed Forces," 202 INT'L REV. OF THE RED CROSS 6 (Jan.–Feb. 1978).

[2]F. de Mulinen, "The Law of War and the Armed Forces," 202 INT'L REV. OF THE RED CROSS 18 (Jan.–Feb. 1978).

[3]Art. 82 of Protocol I, Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict: Protocols I and II to the Geneva Conventions, 16 INTERNATIONAL LEGAL MATERIALS 1391 (Vol. 6, Nov. 1977).

[4]Art. 1, Hague Convention No. IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.

[5] Common articles 47/48/127 and 144 of the Geneva Conventions of 1949.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners on War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 287 [hereinafter cited as GPW Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

[6] *Supra*, n.3.

[7] Draper, *supra* n.1 at 14. This case is discussed at length in an International Affairs Note prepared by International Law Division, OTJAG, in THE ARMY LAWYER, July 1978, at 32.

[8] Draper, *supra* n.1 at 14.

[9] *Id.*

[10] de Mulinen, *supra* n.2.

[11] *Id.* at 19.

[12] *Id.* at 25.

[13] *Id.* at 27.

[14] *Id.* at 33.

[15] *Id.*, 37–43.

Professional Responsibility

Criminal Law Division, OTJAG

Recently The Judge Advocate General considered a case in which CPT T, a Legal Assistance Officer, wrote the following letter on behalf of his client:

Dear Specialist H:

I have been consulted as an attorney and Legal Assistance Officer by SSG W regarding the promissory note which you signed on 15 October 1976, obligating you to pay $2,400.00 in $100.00 monthly installments. Since signing this note, my client has not received one cent of the money that you owe him for the automobile which he transferred to you. My client's attorney previously wrote you a letter which you did not respond. On behalf of my client, I must demand payment of this money justly due to him.

I must advise you of your responsibilities under AR 635–200, Chapter 13 and the fact that you could be eliminated from the service for indebtedness. My client would have legal remedies against you for failing to pay this promissory note when due. My client in good faith transferred to you an automobile and your actions since that time have shown yourself to be nothing more than a lowly dishonest welsher. Such conduct is not befitting of any individual in the U.S. Army particularly an individual holding your rank. Should you fail to act on this matter, I will do everything in my power to insure that your actions will have an adverse effect on your military career. Also, I will do everything within my power to insure that my client in some manner is returned the $2,400.00 which is justly due him.

This letter is written on behalf of my client, SSG W. As such, it reflects my personal and considered judgment as an individual member of the legal profession and is not to be construed as an official view of this headquarters, the U.S. Army, or the U.S. Government.

Sincerely,

1 Incl [CPT T]
Promissory note

In response to this letter, CPT F, JAGC, on behalf of his client, SP 5 H, wrote the following:

Dear CPT T:

This letter is written on behalf of my client, SP5 H, in response to your letter of 6 April 1978.

In October 1976, SP5 H agreed to purchase SSG W's 1975 Ford Mustang for an agreed purchase price of $3,700.00. SP5 H paid $1,300.00 in cash towards the purchase price, thus leaving a balance due of $2,400.00. However, there was an existing lien on the POV in the amount of approximately $4,500.00; Service Federal Credit Union, Pirmasens Branch Office, APO New York 09189, is lienholder. The Credit Union was not willing to finance the POV in any amount above red book value, i.e., $3,700.00. Since neither party could pay off SSG W's note, or apply an amount in cash in order to bring the note down to acceptable refinancing limitations, the parties agreed to the following accommodation: SP5 H signed a promissory note in the amount of $2,400.00 agreeing to pay $100.00 per month. It was further agreed that this amount would be paid to SSG W's account at the Credit Union (See Incls 1 and 2). However, since SSG W's monthly payments were $160.00 per month, SSG W agreed to make $60.00 per month payments to his account. SP5 H kept his part of the bargain and promptly initiated an allotment payable to SSG W's account in the amount of $100.00 per month. However, SSG W did not make the agreed supplemental payment of $60.00 per month. The Credit Union, therefore, threatened to repossess the POV. This matter apparently has been straightened out and SP5 H now owes $1,200.00 on the promissory note, which will be paid off in October 1978 as required. In addition, SSG W must make arrangements to sign all instruments transferring the POV to SP5 H.

Since both parties agreed that the proceeds of the promissory note would be paid to SSG W's loan account at the Credit Union, and this has been done, it appears your letter of 6 April 1978 is based upon misrepresentations of your client, SSG W. Your file is also inaccurate in that SP5 has responded to all inquiries from your office (See Incl 3).

Therefore, it is demanded that you retract your scurrilous letter of 6 April 1978 by formal letter through the same channels to which it was issued.

Very truly yours,

3 Incls [CPT F]
as

This letter is written on behalf of my client, SP5 H. As such, it reflects my personal and considered judgment as an individual member of the legal profession and is not to be construed as an official view of this headquarters, the United States Army, or the United States Government.

Because of the unprofessional language used by CPT T in his letter to SP5 H, he was given an administrative letter of reprimand.

Conduct similar to this has been condemned previously *(The Army Lawyer,* May 1977, p. 19). In addition, signing such a letter is in conflict with Ethical Consideration 7-10, American Bar Association Code of Professional Responsibility which provides: "The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm." CAPT T's approach to the problem demonstrated a failure to distinguish between the functions of representation and of judging a cause. The perceived merit of a client's cause can never justify CPT T's conduct.

In addition, CPT F's letter of response which referred to CPT T's "scurrilous" letter of 6 April 1978, was considered ill-advised. His supervising staff judge advocate was directed to counsel him concerning his use of intemperate language.

This case illustrates the importance of avoiding unprofessional and intemperate language and the pitfalls of basing action on unverified information supplied by a client.

ADMINISTRATIVE AND CIVIL LAW SECTION

Administrative and Civil Law Division, TJAGSA

The Judge Advocate General's Opinions

1. (Duty Status) **Current Army Regulations Do Not Solely Authorize "Flagging" Of A Service Member For Failure To Meet Army Height and Weight Standards.** DAJA-AL 1978/2837, 7 June 1978. In response to an inquiry from MILPERCEN, The Judge Advocate General concluded that neither Army Regulation 600-31 (Suspension of Favorable Personnel Actions) nor Army Regulation 600-9 (The Army Physical Fitness and Weight Control Program) authorized "flagging" *solely* for failure to meet height and weight standards. However, where other action is contemplated, such as administrative elmination, Army Regulation 630-31 authorizes the suspension of favorable personnel action.

2. (Enlistment and Induction—Enlistment) **An Enlistee Whose Promised Course of Instruction Is Broadened To Encompass Additional Skills Has No Basis To Claim An Unfulfilled Enlistment Commitment. Additionally, Even Though He Fails to Successfully Complete The Course of Instruction, All Other Enlistment Promises Remain Valid.** DAJA-AL 1978/2512, 9 May 1978. Where an enlistee was promised both an MOS producing course (Vulcan System Mechanic) and a unit of choice (1st Cavalry Division), the promises are unrelated and each can be enforced separately. Thus, when the enlistee fails to complete the promised MOS course, he must still be assigned to his unit of choice unless that MOS is an absolute prerequisite to every assignment in the unit. Here, The Judge Advocate General expressed the opinion that it was probable that the enlistee could hold *some* position in the 1st Cavalry Division.

Also, where the Vulcan System Mechanic course was expanded to include repair of Forward Area Alerting Radar, the enlistee still received his promised training and his failure in the additional training phase, which precluded award of the anticipated MOS, did not establish a breach of enlistment agreement by the Army.

3. (Enlisted Personnel, Enlisted Reserve) **Failure to Comply With Procedural Requirements of Army Regulation 135-91 In Ordering ARNGUS Member To Involuntary Active Duty Voids The Order.** DAJA-AL 1978/2562, 14 Apr. 1978. An ARNGUS enlistee who was given permission to transfer to a new unit neglected to do so and was ordered to involuntary active duty. He failed to report as ordered, was apprehended and charged with AWOL. However, because of procedural irregularities in the activation process, criminal proceedings were abated and MILPERCEN was asked to direct separation under AR 635-200, Chapter 5 (lack of jurisidiction).

In response to a MILPERCEN inquiry, The Judge Advocate General stated the opinion that no AWOL offense occured because the service member received no actual or constructive notice of the orders to active duty until he was apprehended by civil authorities and returned to military control. Although constructive notice may be effected by mailing the orders, with return receipt requested, to the last address furnished by the member, in this case the orders were misaddressed and there was no evidence that they were mailed. However, if the orders were otherwise valid, jurisdiction would have attached when actual notice of the orders was received upon apprehension and return to military control, and release for lack of jurisdiction would be inappropriate.

In this case, though, the orders were invalid because the member was not informed of his right to appeal the involuntary activation.

When the unit commander prepared the original documentation in September 1976, it was a duty of the area commander to give notice of appeal rights. However, in October 1976, while the documentation was lost in the unit mailroom, AR 135-91 was changed to place this duty on the unit commander. Upon rediscovery in March 1977, the documentation was simply forwarded by the new unit commander without providing notice of appeal rights. Nor did the area commander provide such notice prior to issuing the orders. Accordingly, the orders were void and the member must be released from military custody and control. This action, however, does not prevent the Army from enforcing any reserve obligations still remaining or from discharging the member under appropriate reserve regulation.

4. (Information and Records, General) **Service Members Required to Provide Information Of Prior Convictions Are Obligated To Disclose A Conviction(s) Set Aside UP Federal Youth Corrections Act, 10 U.S. §§ 5005-5024 (1976).** DAJA-AL 1978/2358, 19 Apr. 1978. A command SJA requested an opinion whether a service member who is required to provide information of prior convictions is obligated to disclose information of prior convictions which have been set aside UP 18 U.S.C. § 5021 (1976). This statute provides pertinently:

> Where a youth offender has been placed on probation by the court, the court may therafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction and the court shall issue to the youth offender, a certificate to that effect.

Recognizing that several courts have adopted the position that action under the section precludes disclosure of the conviction, TJAG advised that a conviction which has been set aside under the Federal Youth Corrections Act *must* be disclosed by an applicant for enlistment, appointment or commission in the Army who is requested to disclose information of prior convictions as part of the process.

5. (Information and Records, Release and Access) **A Processing Office Must Make A Preliminary Determination Regarding Releaseability Before Referral Of A FOIA Request To An Initial Denial Authority.** DAJA-AL 1978/2535, 20 Apr. 1978. A request under the Freedom of Information Act for copies of three Army training video tapes was forwarded by the receiving office to the Initial Denial Authority "for review and final action." The letter of transmittal indicated that the receiving office had determined only that the films had not been approved for public exhibition by the Department of the Army as required by regulation. In returning the request to the receiving office, The Judge Advocate General advised that a receiving office must make a preliminary decision before referral of a request under the Freedom of Information Act to an Initial Denial Authority. The preliminary determination must be whether a withholding exemption applies and a legitimate purpose would be served by withholding. The Judge Advocate General also noted that as the Freedom of Information Act, 5 U.S.C. § 552, as implemented, governs the releasability of Army records, release will not be delayed subject to clearance requirements prescribed by other regulatory authority.

6. (Information and Records, Release and Access) **Unclassified Weapons Systems Progress Reports Are Releasable.** DAJA-AL 1977/6235, 4 Jan. 1978. The Judge Advocate General advised that weekly Significant Activities reports published by a Research and Development Command are releasable under the Freedom of Information Act, 5 U.S.C. § 552 (1976). Among other items of information, the publications contained interim progress reports on weapons systems under evaluation and development; however, they were unclassified. It was noted that the reports constituted "records" within the meaning of the Act; the Command's characterization of the published reports as "working notes" was rejected. Neither was the potential for future security classification following addi-

tional development considered a basis for exemption from disclosure UP 5 U.S.C. § 552(b) (1976).

7. (Military Installations, Federal Magistrate) **Nonregular Army Judge Advocates Should Not Be Routinely Appointed As Special Assistant United States Attorneys.** DAJA-AL 1977/6198, 17 Jan 1978. A staff judge advocate requested concurrence in seeking appointment as Special Assistant to the United States Attorney of a nonregular Army JAG officer and an opinion regarding the legaility of appointing a regular Army JAG officer as special Assistant to the United States Attorney. The staff judge advocate was advised of an earlier opinion (DAJA-AL 1976/6127, 3 Jan 1977) in which The Judge Advocate General stated that the appointment of a regular Army JAG officer risks a violation of § 10 U.S.C. 973. A violation of this statute may result in the loss of the commission of a regular Army officer. Therefore, regular Army JAG Officers should not be utilized as Special Assistant United States Attorneys.

The Judge Advocate General then advised that, as a matter of policy, nonregular Army judge advocates should not routinely be appointed as Special Assistant United States attorneys. Such an appointment is not necessary for a judge advocate to prosecute petty offenses before a United States magistrate. Where local United States attorneys express doubts about allowing judge advocates to prosecute, the staff judge advocate should suggest that he seek guidance from his superiors in the Department of Justice.

8. (Military Installations, Legislative Jurisdiction) **Army Medical Treatment Facilities Or Their Personnel Should Be Prohibited From Honoring Directives To Physicians Requesting Withholding Or Withdrawal Of Life-Sustaining Procedures For The Terminally Ill.** DAJA-AL 1978/2402, 8 May 1978. The Judge Advocate General recently rendered an opinion on a proposal by the Surgeon General of the Army to promulgate an Army regulation permitting Army medical treatment facilities to accept written directives from patients for the withholding or withdrawal of life-sustaining procedures in the event of a terminal illness. The proposal was for the Army regulation to operate only in states which had legalized the use of such directives. Specifically, The Surgeon General requested review of the Texas Natural Death Act with a view toward initially authorizing the filing of directives to physicians in the medical records of patients in medical treatment facilities located in Texas.

The Judge Advocate General advised that the only possible uniform rule for dealing with such directives to physicians is to prohibit their use in Army medical treatment facilities. The Judge Advocate General recommended a regulation to that Affect. Several reasons were advanced for this position.

First, medical treatment facilities may be located on land under various kinds of federal legislative jurisdiction. It is likely, but not certain, that in at least some cases, in the absence of a criminal immunity provision such as in the Texas Natural Death Act, the deliberate withholding or withdrawal of medical attention resulting in the death of a patient would be a criminal homicide under both state and federal law. Protection afforded under a state statute such as the Texas Natural Death Act would not afford criminal immunity under the specific federal statutes against homicide in areas of exclusive federal or concurrent (or, perhaps, partial) legislative jurisdiction. See 18 U.S.C. § 1111–1113 (1976). Statutes such as the Texas Natural Death Act cannot affect these federal statutes because the State of Texas cannot change federal laws. Because legislative jurisdiction varies from post to post and from tract to tract within a particular post, a uniform policy to adopt a state statute such as the Texas Natural Death Act is impossible.

Second, such statutes as the Texas Natural Death Act may depend on the status of the physician in question. With regard to civilian doctors, the applicability of a statute such as the Texas Natural Death Act would depend on the nature of jurisdiction over the place and whether the doctor is covered by Texas law.

The Texas Natural Death Act defines "physician" as a physician or surgeon licensed by the Texas State Board of Medical Examiners. A civilian licensed by another state working in a medical treatment facility in Texas would not be considered a physician for purposes of the Texas Natural Death Act. With regard to a military doctor, the applicability of the Texas Natural Death Act also depends on the nature of jurisdiction over the place and may also require that the military doctor be licensed in the state. The problem is further complicated because the military doctor is subject to the Uniform Code of Military Justice and it has not been authoritatively decided whether allowing a patient to die in compliance with such a statute as the Texas Natural Death Act would be a crime under the Uniform Code of Military Justice. That the act would not be a crime under the law of the state is immaterial. Thus, a military doctor could be subject to prosecution for homicide regardless of whether he was licensed in Texas and regardless of the nature of the jurisdiction over the medical treatment facility where the act occurred. Based on these reasons, The Judge Advocate General concluded that the only possible uniform rule for dealing with statutes such as the Texas Natural Death Act is to prohibit their use in Army medical treatment facilities.

9. (Pecuniary Liability) **Service Secretary May Remit Or Cancel Indebtedness Of Member Resulting From Damage To GSA Vehicle.** DAJA-AL 1977/5520, 4 Oct. 1977. SGT *L* damaged a GSA vehicle while the assigned driver. A Report of Survey investigation revealed that "inattentive driving" was the cause of the accident. SGT *L* was found pecuniarily liable and sought remission or cancellation of the debt by the Secretary of the Army.

Para. 70722*b*, DODPM, states "a Secretary may not remit a member's indebtedness because of liability for damage to property of another service," and is apparently based on the language of 43 Comp. Gen. 162 (1963), which cites three primary factors required to give the Secretary power to remit an indebtedness. First, there must be a debt to the United States. Second, the EM seeking remission must fall within the jurisdiction of the Secretary concerned. Third, the department must have jurisdiction over the debt itself.

The third factor is the only factor in issue in the instant situation. Whenever vehicle damage results through misconduct or improper operation by an employee, the agency employing the vehicle operatator is financially responsible under 41 C.F.R. § 101–39.704. *See* 41 C.F.R. § 101–39.807.

The Army is financially responsible for the damage. Therefore, the debt is one within the jurisdiction of the Secretary for remission or cancellation action.

10. (Prohibited Activities and Standards of Conduct, General) **Individual Membership In A Private Organization May Not Be Purchased With Appropriated Funds.** DAJA 1978/2734, 8 June 1978. The Judge Advocate General was requested to render an opinion on the legality of a command purchasing from appropriated funds an individual membership in a private organization. The private organization did not allow institutional memberships and its by-laws did not authorize transfer of membership from one individual to another. The command intended to treat the individual membership as vested in the position rather than the individual because membership would be more beneficial to the command in accomplishing its mission than to the individual.

Under 5 U.S.C. 5946, paying fees for individual membership in a private organization out of appropriated funds is prohibited. The Comptroller General has interpreted this prohibition as requiring a membership to be both principally for the benefit of government and in the institutional name of the government activity involved in order to be legally acquired with appropriated funds. It was the opinion of The Judge Advocate General that the proposed membership, even though it is substantively for the principal benefit of the command, is not an institutional membership and may not be paid for with appropriated funds.

11. (Prohibited Activities and Standards of Conduct, General) **The Conduct of A Lottery On Government-Owned, Leased, Or Controlled Property Is Prohibited.** DAJA 1978/2613, 23 May 1978. Para. 2-7, AR 600-50, and para. XIII, DoD Dir. 5500.7 prohibit conducting a lottery on government-owned, leased, or controlled property, to include the sale of lottery tickets, except where such activity is specifically approved by the Department of the Army. The Judge Advocate General, in commenting on the legality of granting a request for an exception to the lottery prohibition, advised that there is no legal objection to granting such an exception where the lottery was being held overseas and would be in accordance with the foreign country's law and the NATO Status of Forces Agreement.

12. (Prohibited Activities and Standards of Conduct, General) **The Owner Of A Corporation And His Employees, Who Are Retired RA Officers, May Come Under The Provisions Of Article I, Section 9, Clause 8 Of The United States Constitution.** DAJA-AL 1978/2479, 5 May 1978. A retired RA officer who owns and is president of a research services corporation, which employs other retired RA officers, anticipated a contract between his corporation and a foreign government. He requested a clarification of the limitations on retired regular Army officers' employment by a foreign government.

Initially it was pointed out that article I, section 9, clause 8 of the United States Constitution prohibits any person holding a position of trust or profit under the United States from accepting employment with a foreign government without the consent of Congress.- Retired military officers, both regular and reserve, continue to hold such positions. In addition, the provisions of section 509, Public Law 95-105, August 17, 1977, authorize retired Army officers to be employed by foreign governments, if approved by both the Secretary of the Army and Secretary of State.

A corporation is considered to be a legal entity, separate and distinct from its stockholders, officers, and employees, and therefore in most cases the corporation would be considered to be employed by the foreign government and not the corporation's owners, officers or employees. In this case the retired officer was advised that if he owns all, or substantially all, the outstanding stock of the corporation, it is possible that he would be considered a direct employee of the foreign government and subject to the Constitutional restrictions. Additionally, it was noted that the degree of control the foreign government has authority to exercise over the employees of a corporation may be looked to in deciding whether the employment involved is with the corporation or the foreign country. (The officer was referred to 53 Comp. Gen. 753 (1974).)

The officer was advised to seek official approval of the proposed corporate contract to avoid possible loss of retired pay. The request for approval should contain a detailed description of the duties to be performed, the source of compensation to be received, and a statement signed by the retired member stating that he or she will not be required to execute an oath of allegiance to the foreign government. It should be sent to: Commander, United States Army Reserve Components Personnel and Administration Center, ATTN: AGUZ-RCPD-PAD, 9700 Page Blvd., St. Louis, Missouri 63132.

Note: detailed guidance regarding requests for approval of foreign government employment is contained in AR 600-291, 1 July 1978, effective 1 Sept. 1978.

13. (Prohibited Activities and Standards of Conduct, (General) **United States Government Employees Are Prohibited From Participating In Gambling Activities While On Duty For The Government.** DAJA-AL 1978/1788, 3 Feb. 1978. The Judge Advocate General was queried on the legality of the presence of slot machine-type devices in local national canteens. For local national personnel who are U.S. Government employees, the opinion was expressed that para. 2-7, AR 600-50, would be applicable, prohibiting their participation in gambling activities "while on Government-owned,

controlled, or leased property or otherwise while on duty for the Government . . . . " It was recommended that questions as to the status of the local national employees, the provisions of foreign national labor relation agreements, and the effects of SOFA and collateral international agreements on the issue be referred to the Judge Advocate, USAREUR.

14. (Separation from the Service) **Appellate Court Action Which Set Aside Convictions Because Of Inadequate Providency Inquiry On Guilty Plea Does Not Preclude Later Administrative Discharge UP Chapter 13 Or 14, AR 635-200, Under Administrative Double Jeopardy Rule.** DAJA-AL 1978/2322, 12 Apr. 1978. A number of convictions were set aside under *United States* v. *Green*, 1 M.J. 453 (C.M.A. 1976) based on inadequate inquiry by the military judge into the providency of guilty pleas involving pretrial agreements. Rehearings were authorized. A field SJA inquired whether the administrative double jeopardy provisions of paragraph 1-19*b*(1), AR 635-200 would prohibit separation UP Chapters 13 and 14, AR 635-200 in these cases, *i.e.*, whether the appellate action or withdrawal or dismissal of the charges constituted an acquittal or action having the effect thereof.

OTJAG indicated that neither the action of the appellate courts nor the withdrawal or dismissal of the charges by the convening authority constitutes an acquittal or action having the effect thereof within the meaning of paragraph 1-19*b*(1), AR 635-200. In concept, the effect of the action of the appellate courts is that there was no trial on the general issue of guilt or innocence. Subsequent withdrawal or dismissal of the charges in this circumstance is not a factual determination absolving the accused of the alleged misconduct. The effect of the authorization of a rehearing is to treat the earlier court proceeding as a nullity, and thereby to treat the charges as in the same posture as before the first trial. Accordingly, there would be no legal objection under paragraph 1-19*b*(1), AR 635-200, to processing these cases under applicable provisions of Chapters 13 or 14, AR 635-200.

TJAG has also advised that a member could be separated with an other than honorable discharge where, based on a pretrial motion, the military judge dismissed charges because the government had insufficient evidence after he ruled a confession and identification were inadmissable prior to plea by the accused (DAJA-AL 1976/6157, 29 Dec. 1976); where the charges were dismissed by the military judge for lack of speedy trial (*id.* 1972/4523, 10 July 1972), and where there was constructive condonation of desertion (*id.* 1972/4047, 1 May 1972).

Also, withdrawal of charges from trial and dismissal of charges by the convening authority do not have the effect of an acquittal (JAGA 1969/3674, 3 Apr. 1969 (withdrawal); DAJA-AL 1973/3564, 1 Mar. 1973 (dismissal following an Article 32 investigation but before referring the charges to trial); *id.*, 1977/5067, 16 Aug. 1977 (dismissal or withdrawal after Article 32 investigation, with GCMCA agreeing that there was sufficient evidence to refer the case to trial)).

The administrative separation route may be chosen where that action is reasonable, justifiable, and supported by the evidence in the file, even though there may be difficulty in obtaining the testimony of witnesses at a trial by court-martial (DAJA-AL 1977/5067; JAGA 1969/3674).

15. (Separation From Service, Discharge) **Separation For Fraudulent Entry Based Upon Recruiter Connivance Not Appropriate Absent a Disqualification For Enlistment And Fraudulent Intent.** DAJA-AL 1978/2292, 13 Apr. 1978. The ABCMR requested an OTJAG opinion on the following case. During a background investigation in 1976, it was determined the EM had not disclosed a felony arrest that occurred after his enlistment in the Delayed Entry Program on 18 July 1974, but prior to his enlistment in the RA and entry on active duty on 9 December 1974. The arrest involved a theft of $50 from the EM's civilian employer. On 14 October 1974, he was accepted into the Pennsylvania Accelerated Rehabilitative Dis-

position Program for this incident. He was placed on probation for 45 days, ordered to make restitution and pay a fine. The procedure allowed him to avoid making a plea and, upon successful completion of the probation, to have the charges dismissed.

In the applicant's case, charges were not dismissed until February 1975, after his entry on active duty, although he was entitled to have them dismissed *prior* to his enlistment in the RA.

The EM stated that he mentioned this matter to the recruiter, but was advised "not to worry about it." When these facts were brought to the attention of the GCMCA in September 1976, he ordered the EM's release from active duty on the grounds of fraudulent enlistment with recruiter connivance. An application to the ABCMR followed.

OTJAG stated the opinion that, considering the context of the Pennsylvania proceedings, the fact that the applicant raised the matter of the proceedings with the recruiter, the fact that he was qualified for enlistment (because he had completed his probation and was entitled to dismissal of the charges) or could have easily become qualified (by having the charge dropped in accordance with the Pennsylvania procedures), there was no fraudulent intent attributable to him. Accordingly, the mandatory viodance of enlistment as required by AR 635-200, para. 14-4*a*, was not applicable to his case and the EM should not have been released from service.

TJAG recognized the possibility of discharge for concealment of an arrest record UP AR 635-200, para. 5-38, but considered he would not have been discharged under the circumstances of this case.

16. (Separation From The Service, Release From Military Control) Service Member Who Enlists And Deserts While Still Underage And Remains In Desertion Status, Should Be Separated UP Paragraph 5-11 AR 635-200 (Lack of Jurisdiction—Void Minority Enlistment). DAJA-AL 1978/2471, 5 May 1978. Private *B* enlisted in the Army on 21 April 1976 using the name and birth certificate of a friend, Mr. *E*. His DOB was shown as February 1956; his actual DOB was February 1960. He departed AWOL on 30 April 1976, just nine days after his fraudulent enlistment. He was apprehended by civil authorities on 16 August 1976, but departed AWOL again on 23 August 1976. He was DFR of his unit on 18 January 1977. His present whereabouts are unknown.

OTJAG expressed the opinion that Private *B*, alias Mr. *E*, was not subject to military jurisdiction because his minority enlistment was void. No constructive enlistment arose. He was only 16 during his brief involuntary contact with the military following apprehension and had no contact lwith the military while either 17 or 18. Even though he fradulently procured his enlistment, by concealment of minority and of true name, it is not treated as fraudulent entry (paras. 14-4 and 14-4g, AR 635-200). However, chapter 7, AR 635-200 (minority), is not applicable by its terms because *B* is neither under military control nor still under age 18. Accordingly, his case should be processed UP para. 5-11, AR 635-200 (lack of jurisdiction), and he may be separated *in absentia*.

JUDICIARY NOTES

From: U.S. Army Judiciary

ADMINISTRATIVE NOTES

Staff Judge Advocates are reminded of the following:

a. If a sentence as approved by the convening authority does not include confinement, or if the sentence to confinement is suspended or deferred, forfeitures may not be applied until the sentence is ordered into execution, unless the suspension to confinement is vacated, or

the deferment is rescinded. A statement to the effect that confinement and/or the application of forfeitures is deferred until the sentence is ordered into execution, unless such deferment is sooner rescinded, should be included in the initial action of the convening authority. *See* para 88*d*(3), MCM, 1969 (Rev.).

b. All requests for deferment of confinement should be in writing and attached as part of the record.

QUARTERLY COURT-MARTIAL RATES PER 1000 AVERAGE STRENGTH APRIL -JUNE 1978

	GENERAL CM	*SPECIAL CM*		*SUMMARY CM*
		BCD	*NON-BCD*	
ARMY-WIDE	.36	.24	1.31	.60
CONUS Army commands	.23	.19	1.26	.73
OVERSEAS Army commands	.57	.31	1.39	.37
USAREUR and Seventh Army commands	.64	.18	1.44	.19
Eighth US Army	.25	1.10	1.43	.33
US Army Japan	.35	—	—	—
Units in Hawaii	.42	.53	1.64	1.48
Units in Thailand	—	—	—	—
Units in Alaska	.20	.30	1.42	.20
Units in Panama /Canal Zone	1.39	—	—	3.47

NOTE: Above figures represent geographical areas under the jurisdiction the commands and are based on average number of personnel on duty within those areas.

NON-JUDICIAL PUNISHMENT QUARTERLY COURT-MARTIAL RATES PER 1000 AVERAGE STRENGTH APRIL-JUNE 1978

	Quarterly Rates
ARMY-WIDE	52.47
CONUS Army commands	54.05
OVERSEAS Army commands	49.87
USAREUR and Seventh Army commands	48.69
Eighth US Army	67.02
US Army Japan	10.35
Units in Hawaii	54.66
Units in Thailand	—
Units in Alaska	38.47
Units in Panama/Canal Zone	43.06

NOTE: Above figures represent geographical areas under the jurisdiction of the commands and are based on average number of personnel on duty within those areas.

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DEPARTMENT OF ARMY
CONVICTIONS AND NONJUDICIAL PUNISHMENTS

Reporting Period

1 JAN To 30 JUN 1978

	NUMBER AND RATE/1000 OF PERSONS CONVICTED AND PERSONS PUNISHED UNDER ARTICLE 15 UCMJ							
	WORLDWIDE		CONUS		OVERSEAS (EXCEPT VN)		VIETNAM	
	Number	Rate/1000	Number	Rate/1000	Number	Rate/1000	Number	Rate/1000
General Courts Martial	473	.62	212	.44	261	.90		
Special Courts Martial	2,076	2.70	1,293	2.70	783	2.71		
Summary Courts Martial	793	1.03	621	1.30	172	.59		
Total Courts-Martial	3,342	4.35	2,126	4.44	1,216	4.20		
Nonjudicial Punishments (Art. 15, UCMJ)	80,146	104.3	51,489	107.5	28,657	99.1		
U.S. Federal & State Courts (Felony* Convictions)	324	.42	322	.67	2	.007		

	NUMBER OF DISCHARGES ADJUDGED & ACTUALLY EXECUTED DURING REPORTING PERIOD									
	DISCHARGES ADJUDGED								DISCHARGES EXECUTED	
	WORLD-WIDE		CONUS		OVERSEAS (EXCEPT VN)		Vietnam			
Type Court	DD	BCD	DD	BCD	DD	BCD	DD	BCD	DD	BCD
GCM	107	246	46	122	61	124			76	333
SPCM		285		200		85				

* A conviction is reportable when the offense is a felony under the law of the jurisdiction in which the accused was convicted.

* Dishonorable Discharge; Bad Conduct Discharge

LEGAL ASSISTANCE ITEMS

Major F. John Wagner, Jr., Developments, Doctrine and Literature Department, and Major Joseph C. Fowler, Jr. and Major Steven F. Lancaster, Administrative and Civil Law Division, TJAGSA.

1. ITEMS OF INTEREST.

Taxation–State And Local Income Tax–Rhode Island.

In what appears to be a direct response to the Supreme Court of Rhode Island's decision in *Flather v. Tax Administrator* (No. 75-136-M.P.) (see *Legal Assistance Item*, THE ARMY LAWYER, Dec. 1974 at 38), the Rhode Island General Assembly has amended R.I. Gen. Laws § 44-30-5. This amendment includes any person who is domiciled in the state in the definition of resident individual for purposes of the Rhode Island state income tax. This definition applies to taxable years beginning on or after 1 January 1978. As a result of this amendment service members domiciled in Rhode Island will not be able to claim a tax exempt status as a nonresident domiciliary and will therefore be subject to Rhode Island income tax. [Ref: Ch. 43, DA PAM 27-12.]

2. ARTICLES OF INTEREST.

Taxation–Federal Estate Tax And Gift Tax.

Madden, *Is the Living Gift Really Dead?* 56 TAXES 435 (August 1978). Sacks, *An Estate Planning Tool–Severance and Re-Creation of Joint Tenancies*, 24 PRAC. LAW. 71 (July 1978).

[Ref: Ch. 42, DA PAM 27-12.].

CLAIMS ITEM

FROM: U.S. Army Claims Service, OTJAG

Changes to the Centralized Recovery Program: On 1 August 1978, all claims approving and settlement authorities assumed responsibility for baggage and household goods recovery actions against third parties which could be settled in amounts of $100.00 or less. The field is still required to process files exceeding $100.00 in approximately the same manner as prescribed when centralized recovery commenced in May 1976. The basic requirements for processing are set forth in paragraph 11-40 of AR 27-20. Although these requirements may appear on the surface to be exacting, they are necessary for an effective recovery operation. Most of the administrative processing which is required to provide the basis for recovery should have already been completed to justify the proper payment of the claim. Any additional processing required should use no more than 10-15 minutes of a clerk's time per average claim file. These administrative requirements can be done more efficiently in the field where the personnel are already familiar with the file. The Claims Service has an active workload and backlog of approximately 25,000 potential recovery files. The backlog has increased each month for the past year. It is anticipated that recoveries of $100.00 or less by the field will give this Service a reduced monthly input so that the backlog can be reduced.

The Claims Sevice requests the help and assistance of all claims approving and settlement authorities to make these new procedures work. A sustained good faith effort must be made to fully resolve the $100.00 or less recovery actions and they should be declared an impasse' only after all other reasonable efforts have failed. In your demand letter to the carriers, continue to stress that their response must be to your address in order to avoid misdirected mailings. The demand form letter

must also be modified to indicate that checks should be made payable to the Treasurer of the United States. In addition, failure to comply with requirements regarding preparation of files for recovery actions over $100.00 create exceptions to normal processing procedures in the Centralized Recovery Branch. These exceptions consume an inordinate number of manhours which should be devoted to normal operations. Strict compliance by local claims offices with published instructions is of the utmost importance. Help us achieve a recovery system which will return the maximum amount of monies at the least overall cost to the Government.

RESERVE AFFAIRS SECTION

Reserve Affairs Department, TJAGSA

1. Court-Martial Detachment Training.

JAGSO Court-Martial Defense teams' quadrennial training at TJAGSA was conducted 10-21 July 1978. The training consisted of seminars, lectures and practical exercises in military justice to include an update of recent developments in the same subject area. The administrative support was provided by 1157th USAR School from Schenectady, New York, Colonel John F. O'Conner, Commandant.

2. LEGAL SERVICES OFFERED BY 5th MILITARY LAW CENTER

Since the fall of 1977, the 5th Military Law Center has greatly expanded its support of active military installations in Northern California. Members of this reserve unit are now providing legal assistance to the following military bases in the Northern California area: NAS - Moffat Field (Mountain View, California); Treasure Island Navy Base (San Francisco); Naval Supply Depot (Oakland); Beale Air Force Base (Marysville, California); Alameda Naval Air Station; Sacramento Army Depot; Defense Depot Tracy; and Sharpe Army Depot (Lathrop).

Personnel of this unit include general practitioners, assistant district attorneys, judges, and federal and state governmental lawyers. Additionally, these lawyers have experience in providing legal assistance to military personnel, and providing advice on mission related matters such as procurement, military affairs, military justice and the civilian personnel matters.

Law Center Commander Lieutenant Colonel Robert J. Smith has also offered other military installations the opportunity to utilize these legal services to augment or expand present capabilities in legal assistance. Legal advice usually includes wills, powers of attorney, contract matters, domestic relations, consumer affairs, and general civil matters. Colonel Smith also wishes other reserve units to know that the 5th JAG Detachment is prepared to offer pre-mobilization counseling to all reserve units in the San Francisco Bay Area.

3. RESERVE COMPONENTS TECHNICAL TRAINING (ON-SITE) SCHEDULE

The schedule which follows sets forth the subject, date, and city of the on-site training to be presented in academic year 1978-79. Also included is a list of the local "action officers" and the training site location for each unit.

Reserve Component officers who do not receive notification of the on-site program through their unit of assignment are encouraged to confirm the date, time and location of the scheduled training with the action officer. In order to provide maximum opportunity for interested JAG officers to take advantage of this training coordination should be initiated with units other than JAGSO detachments and with members of the Individual Ready Reserve (IRR). In addition, all active duty JAGC officers assigned to posts, camps and stations lo-

cated near the scheduled training site are encouraged to attend the sessions.

Detachment commanders who have not already done so are requested to amend their unit training schedule to conform to the published schedule. For those units performing OJT at various posts, it may be necessary to advise the SJA involved that your unit may not be available for OJT during the date of the "on-site" training.

Reserve Component JAG Corps officers assigned to troop program units other than Judge Advocate General Service Organizations should advise their commander of the "on-site" training and request equivalent training for unit assemblies during the month of the technical training.

Questions by local Reserve Component officers concerning the on-site instruction should be directed to the appropriate action officer. Problems encountered by action officers or unit commanders should be directed to Captain Lumpkins, Reserve Affairs Department, The Judge Advocate General's School, Charlottesville, Virginia 22901. Captain Lumpkins' telephone numbers are commercial (804) 293-6121 and Autovon 274-7110, extension 293-6121.

SCHEDULE FOR RESERVE COMPONENT TECHNICAL TRAINING (ON-SITE) PROGRAM, A/Y 1978-79

	City	*Date & Time*	*Subject*	*Action Officer Phone*	*Training Site Location*
1	Boston	28 Oct 78 0800–1700	Criminal Law Admin & Civil Law International Law	WO Paul Kennedy 617-796-2255	Boston USAR Center.
2	Omaha	4 Nov 78 0800–1700	Criminal Law Admin & Civil Law	COL John P. Churchman 712-322-4965	USAR Center
	Kansas City (to include Topeka)	5 Nov 78 0800–1700	Criminal Law Admin & Civil Law International Law (Tape)	LTC Robert S. Clark 816-231-4474	Liberty Memorial
3	Los Angeles	18 Nov 78 0800–1700	Criminal Law Admin & Civil Law International Law	LTC Cliff Larson 213-688-4664	JAG Office Building #32 Fort MacArthur
	Tucson (to include Phoenix)	19 Nov 78 0800–1700	Criminal Law International Law (Tape)	MAJ Harold Dale 602-538-3181	Office of SJA Fort Huachuca
	San Diego	19 Nov 78 0800–1700	Admin & Civil Law International Law	MAJ Donald Clark 714-477-3177	Miramar Naval Air Station
4	Seattle	13 Jan 79 0800–1700	Criminal Law Admin & Civil Law International Law	LTC John P Cook 206-624-7990	Harvey Hall Fort Lawton
	San Francisco	14 Jan 79 0800–1700	Criminal Law Admin & Civil Law International Law	LTC Robert J. Smith 415-961-3300	6th Army Conference Room Building #35 Presidio, California
	Honolulu	16–17 Jan 79 1900–2300	Criminal Law Admin & Civil Law International Law	COL Donald C. Machado 808-438-9953	Bruyeres Quadrangle

	City	Date & Time	Subject	Action Officer Phone	Training Site Location
5	Washington, DC	4 Feb 79 0800–1700	Criminal Law Admin & Civil Law International Law Procurement	MAJ George R. Borsari 202-296-8900	Southern Maryland Memorial USAR Center
	San Juan Puerto Rico	5, 6 Feb 79 1900–2300	Criminal Law Admin & Civil Law International Law Procurement	LTC Luis Feliciano 809-764-6135	Conference Room HQ Puerto Rico National Guard
6	Austin	10 Feb 79 0800–1700	Criminal Law International Law	MAJ Charles Sebesta 713-567-4362	USAR Center
	Dallas/Ft Worth	11 Feb 79 0800–1200	Criminal Law	LTC Virgil A. Lowrie 817-387-3831—Ext 222	Muchert Reserve Center
	Little Rock	11 Feb 79 0800–1200	Admin & Civil Law (Tape) International Law	MAJ Don Langston 501-785-2326	Seymour Terry Armory
7	Atlanta	10 Feb 79 0800–1700	Criminal Law Admin & Civil Law	CPT Robert A. Bartlett 404-588-1100	Chamblee Armory
8	San Antonio	24 Feb 79 0800–1700	Criminal Law Admin & Civil Law	MAJ John Compere 512-225-3031	USAR Center 2010 Harry Wurzbach Highway
	Houston	25 Feb 79 0800–1700	Criminal Law Admin & Civil Law	MAJ Donald M. Bishop 713-666-8000, Ext 4184	Annex Building
9	Miami	24 Feb 79 0800–1700	Criminal Law International Law	LTC Alden N. Drucker 305-538-1401	5601 San Amaro Drive
	Orlando	25 Feb 79 0800–1200	Criminal Law	COL Theodore H. Van Deventer 305-656-1753	Orlando Naval Training Center
	Tampa/ St. Petersburg	25 Feb 79 0800–1200	International Law	MAJ James L. Livingston 813-385-5156	USAR Center St. Petersburg, Florida
10	Denver (to include Colorado Springs)	3 Mar 79 0800–1700	Criminal Law Admin & Civil Law Procurement	LTC Bernard Thorn 303-573-7600	1-332 Fitzsimons Army Medical Center
	Salt Lake City	4 Mar 79 0800–1700	Criminal Law Admin & Civil Law	COL G. Gail Weggeland 801-524-5796	Bldg #107 Fort Douglas
	Albuquerque	3 Mar 79 0800–1200	International Law	LTC John McNett 505-264-7265	Bldg #327 Kirkland AFB
	Tulsa	4 Mar 79 0800–1700	International Law Procurement	LTC Arthur W. Breeland 918-582-5201	USAR Center
11	Louisville (to include Lexington)	10 Mar 79 0800–1700	Criminal Law Admin & Civil Law Procurement	LTC Martin F. Sullivan 502-587-0145	Hangar #7 Bowman Field

	City	Date & Time	Subject	Action Officer Phone	Training Site Location
	Memphis	11 Mar 79 0800–1700	Criminal Law Admin & Civil Law Procurement	MAJ Robert G. Drewry 901-526-0542	Marine Hospital
12	Harrisburg	10 Mar 79 0800–1700	Criminal Law Admin & Civil Law	LTC Harvey S. Leedom 717-782-6310	Bldg #442 New Cumberland Army Depot
13	New York	17 Mar 79 0800–1700	Criminal Law Admin & Civil Law International Law	LTC Michael Bradie 516-295-3344	Petterson USAR Center
	Philadelphia	18 Mar 79 0800–1700	Criminal Law Admin & Civil Law International Law	CPT Donald Moser 215-925-5800	USAR Center Willow Grove, Pennsylvania
14	Madison	7 Apr 79 0800–1200	Criminal Law	LTC Dean Massey 608-262-3568	Madison AFR Armory
	Milwaukee	8 Apr 79 0800–1200	Criminal Law	LTC James Moll 414-762-7000	536 West Silver Spring Drive
15	Indianapolis	7 Apr 79 0800–1700	Admin & Civil Law International Law	COL Theodore Wilson 317-923-4573	Boros Hall
	St. Louis	8 Apr 79 0800–1700	Admin & Civil Law International Law	LTC Claude McElwee 314-421-5442	TBA
16	Richmond	21 Apr 79 0800–1700	Admin & Civil Law (Tape) Procurement	MAJ Robert H. Cooley 804-732-4667	Michelli USAR Center
17	Inkster	21 Apr 79 0800–1200	Procurement	LTC Cay A. Newhouse 313-264-1100, Ext 2465	USAR Center West 11 Mile Road Southfield, Michigan
	Minneapolis	21 Apr 79 0800–1700	Criminal Law Admin & Civil Law	MAJ Robert M. Frazee 612-388-0661	Bldg #501 Ft. Snelling
	Chicago	22 Apr 79 0800–1700	Criminal Law Admin & Civil Law Procurement	CPT John C. Jahrling 312-829-4334	Moskala USAR Center
18	Columbia (to include Spartanburg)	28 Apr 79 0800–1700	Criminal Law (Tape) Admin & Civil Law	COL Hugh Rogers 803-359-2599	Forest Drive Armory
	Birmingham	29 Apr 79 0800–1700	Criminal Law (Tape) Admin & Civil Law	LTC Edwin Strickland 205-325-5688	142 West Valley Avenue
19	Pittsburgh	5 May 79 0800–1700	Criminal Law (Tape) Admin & Civil Law	MAJ Bruce Bowden 412-562-8844	Gen Malcom Hay Armory
20	Columbus	5 May 79 0800–1700	Criminal Law Admin & Civil Law	CPT Richard Sheward 614-486-6663	Conference Room HQ 83rd ARCOM, Bldg 306 Defense Construction Supply Center

	City	Date & Time	Subject	Action Officer Phone	Training Site Location
	Cleveland	6 May 79 0800–1700	Criminal Law Admin & Civil Law	MAJ David E. Burke 216-623-1350, Ext 2006	MOTE USAR Center
21	Jackson	19 May 79 0800–1700	Criminal Law (Tape) Admin & Civil Law	LTC Edward Cates 601-948-2333	USAR Center
	New Orleans (to include Baton Rouge)	20 May 79 0800–1700	Criminal Law (Tape) Admin & Civil Law International Law (Tape)	CPT Stanley Millan 504-865-1121, Ext 252	USAR Center

Current FLITE Searchable Data Base

The information in this Article is digested from the FLITE Newsletter, Vol. XI, No. 2, Apr.–Jun. 1978.

The following is a list of data bases searchable in the FLITE system as of 15 June 1978. Much of this data is searchable by FLITE's attorney-advisors through remote terminals with direct access to the JURIS on-line system located in the Department of Justice, Washington, D.C. Data bases on which FLITE has on-line search capability are indicated by asterisks.

*Constitution of the United States	Thru Amendment XXVI (1787 to present)
*United States Code	Titles 1-50 APP, 1970 Thru Supp III and Pub Laws to Mar 1978
*United States Reports	Vols 45-422 (Oct 1846–Jan 1975)
*Supreme Court Reporter	Vols 96–98 (Jan 1975–May 1978)
*Federal Reporter 2d Series	Vols 116-572 (Jun 1941–May 1978)
*Federal Supplement	Vols 30–446 (Jul 1939–May 1978)
*Federal Digest	1961–present
*United States Court of Claims	Vols 134–206 (Jan 1956–Apr 1975)
Armed Services Procurement Regulation	1975 Ed (Oct 1975)
Board of Contract Appeals Decisions	Vols 56–2 thru 76–2 (Jul 1956–Dec 1976)
*Published	Vols 1–54 (Jun 1921–June 1975)
Unpublished	(Jun 1955–Jul 1976)
*Court-Martial Reports	Vols 1–54 thru page 1241 (Dec. 1951–Mar 1977)
*Military Justice Reporter	Vol 3 M.J. Adv. Op. pp 1–347 (Mar 1977–Nov 1977)
Air Force Regulations	AFR 1–2 thru AFR 900–47 (Dec 1975)
*Code of Federal Regulations	1974 Ed, Titles 10, 18, 28 and 37
Manual for Courts-Martial	1968 Rev. Ed
Treaties and International Agreements	
Published	DoD Selected (June 1949–Dec 1974)
Unpublished	DoD Selected (June 1947–1975)

FLITE is chartered by the Department of Defense to provide computer based legal research and special products to all agencies of the federal government. The DoD General Counsel provides policy guidance, and The Judge Advocate General of the Air Force serves as executive agent.

Search services are provided without charge to the Executive Offices of the President; the Congress (including the Library of Congress), the Supreme Court; the Department of Defense and its military components; and the United States Coast Guard. A fee of $50 for each data base searched is charged to all other agencies and activities of the federal government.

FLITE CAN be contacted at FLITE (HQ USAF/JAESL), Denver, CO 80279, commercial telephone (303) 320-7531, autovon 926-7531, or FTS 326-7531.

CLE NEWS

1. Civilian Sponsored CLE Courses.

SEPTEMBER

13–15: Institute for Paralegal Training, Workshop for Paralegal Managers, Philadelphia, PA. Contact: Kathryn Mann, Continuing Professional Education, The Institute for Paralegal Training, Suite 819, 1616 Walnut St., Philadelphia, PA 19103. Phone: (215) 731-6999. Cost: $395.

14–15: PLI, Labor-Management Relations: Personnel Practices and Collective Bargaining Agreements, Barbizan Plaza Hotel, New York, NY. Contact: Practicing Law Institute, 810 Seventh Ave., New York, NY 10019. Phone: (212) 765-5700. Cost: $185.

15–16: PLI, 16th Annual Defending Criminal Cases: The Rapidly Changing Practice of Criminal Law, Americana Hotel, New York, NY. Contact: Practicing Law Institute, 810 Seventh Ave., New York NY 10019. Phone: (212) 765-5700. Cost: $160.

18–19: Institute for Paralegal Training, Preparation, Houston, TX. Contact: Kathryn Mann, Continuing Professional Education, The Institute for Paralegal Training, Suite 819, 1616 Walnut Street, Philadelphia, PA 19103. Phone: (215) 732-6999. Cost: $225.

25–29: Southern Federal Tax Institute, Inc., 135th Annual Southern Federal Tax Institute, Hyatt Regency, Atlanta, GA. Contact: Southern Federal Tax Institute, Inc., 207 Cain Tower, 229 Peachtree Street, NE, Atlanta, GA 30303. Cost: $225.

28–29: Institute for Paralegal Training, Seminar on Evidence and Trial Preparation, Washington, DC. Contact: Kathryn Mann, Continuing Professional Education, The Institute for Paralegal Training, Suite 819, 1616 Walnut St., Philadelphia, PA 19103. Phone: (215) 732-6999. Cost: $225.

OCTOBER

5–6: PLI, Practical Will Drafting, Americana Hotel, New York, NY. Contact: Practicing Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700. Cost: $175.

6–7: PLI, 16th Annual Defending Criminal Cases: The Rapidly Changing Practice of Criminal Law. The Beverly Hilton Hotel, Los Angeles, CA. Contact: Practicing Law Institute, 819 Seventh Ave., New York, NY 10019. Phone: (212) 765-5700. Cost: $160.

13–15: National College of Criminal Defense Lawyers and Public Defenders, Jury Selection Techniques, St. Louis, MO, Contact: Registrar, NCCDLPD, College of Law, University of Houston, 4800 Calhoun, Houston, TX 70004. Phone: (713) 749-2283.

16–18: University of Baltimore, School of Business and Federal Publications, Inc., Small Purchasing Course, Airport Park Hotel, Los Angeles, CA. Contact: Miss J. K. Van Wycks, Seminar Division, Federal Publications, Inc., 1725 K St., N.W., Washington, DC 20006. Phone: (202) 337-7000.

16–20: University of Santa Clara School of Law and Federal Publications, Inc., The Skills of Contract Administration, Stouffer's Denver Inn, Denver, CO. Contact: Miss J. K. Van Wycks, Seminar Division, Federal Publications, Inc., 1725 K St., N.W., Washington, DC 20006. Phone: (202) 337-7000. Cost: $575.

18–20: University of Baltimore School of Law and Federal Publications, Inc., Practical Negotiation of Government Contracts, Sheraton National, Arlington, VA. Contact: Miss J. K. Van Wycks, Seminar Division, Federal Publications, Inc., 1725 K Street, NW, Washington, DC 20006. Phone: (202) 337-7000. Cost: $475.

19–20. University of Baltimore School of Business and Federal Publications, Inc., Procurement for Secretaries, Airport Park Hotel, Los Angeles, CA. Contact: Miss J. K. Van Wycks, Seminar Division, Federal Publications, Inc., 1725 K St., N.W., Washington, DC 20006. Phone: (202) 337-7000.

19–22: National Legal Aid and Defender Association and National Clients Council, 56th Annual Conference, Washington Hilton Hotel, Washington, DC. Contact: National Legal Aid and Defender Association, 2100 M St., N.W., Suite 601, Washington, DC 20037.

NOVEMBER

2–3: PLI, Practical Will Drafting, Hyatt Regency Hotel, Phoenix, AZ. Contact: Practicing Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700. Cost: $175.

4–6: National College of Criminal Defense Lawyers and Public Defenders, Advanced Cross-Examination Techniques in Drug Cases, Las Vegas, NV. Contact: Registrar, NCCDLPD, College of Law, University of Houston, 4800 Calhoun, Houston, TX 77004. Phone: (713) 749-2283.

5–10: National Judicial College, Alcohol and Drugs—Specialty, University of Nevada, Reno, NV. Contact: National Judicial College, University of Nevada, Reno, NV 89557. Phone: (703) 784-6747.

6–7: PLI, Labor-Management Relations: Personnel Practices and Collective Bargaining Agreements, Fairmont Hotel, San Francisco, CA. Contact: Practicing Law Institute, 810 Seventh Ave., New York NY 10019. Phone: (212) 765-5700. Cost: $185.

6–8: University of Baltimore School of Business and Federal Publications, Inc., Small Purchasing Course, Sheraton National, Arlington, VA. Contact: Miss J. K. Van Wycks, Seminar Division, Federal Publications, Inc., 1725 K St., NW, Washington, DC 20006. Phone: (202) 337-7000.

9–10: University of Baltimore School of Business and Federal Publications, Inc., Procurement for Secretaries, Sheraton National, Arlington, VA. Contact: Miss J. K. Van Wycks, Seminar Division, Federal Publications, Inc., 1725 K St., NW, Washington, DC 20006. Phone: (202) 337-7000.

12–17: National Judicial College, Sentencing Misdemeanants—Specialty, University of Nevada, Reno, NV. Contact: National Judicial College, University of Nevada, Reno, NV 89557. Phone: (702) 784-6747.

17–19: National College of Criminal Defense Lawyers and Public Defenders, Advanced Cross-Examination Techniques in Drug Cases, New York, NY. Contact: Registrar, NCCDLPD, College of Law, University of Houston, 4800 Calhoun, Houston, TX 77004. Phone: (713) 749-2283.

27–29: University of Baltimore School of Law and Federal Publications, Inc., Practical Negotiations of Government Contracts, Airport Park Hotel, Los Angeles, CA. Contact: Miss J. K. Van Wycks, Seminar Division, Federal Publications, Inc., 1725 K St., NW, Washington, DC 20006. Phone: (202) 337-7000. Cost: $475.

2. TJAGSA CLE Courses.

September 18–29: 77th Procurement Attorney's Course (5F–F10).

October 2–6: 9th Law of War Workshop (5F–F42).

October 10–13: Judge Advocate General's Conference and CLE Seminars.

October 16–December 15: 88th Judge Advocate Officer Basic (5–27–C20).

October 16–20: 5th Defense Trial Advocacy (5F–F34).

October 23–November 3: 78th Procurement Attorney's Course (5F–F10).

November 6–8: 2d Criminal Law New Developments (5F–F35).

November 13–16: 8th Fiscal Law (5F–F12).

November 27–December 1: 43d Senior Officer Legal Orientation (5F–F1).

December 4–5: 2d Procurement Law Workshop (5F–F15).

December 7–9: JAG Reserve Conference and Workshop.

December 11–14: 6th Military Administrative Law Developments (5F–F25).

January 8–12: 9th Procurement Attorneys' Advanced (5F–F11).

January 8–12: 10th Law of War Workshop (5F–F42).

January 15–17: 5th Allowability of Contract Costs (5F–F13).

January 15–19: 6th Defense Trial Advocacy (5F–F34).

January 22–26: 44th Senior Officer Legal Orientation (5F–F1).

January 29–March 30: 89th Judge Advocate Officer Basic (5–27–C20).

January 29–February 2: 18th Federal Labor Relations (5F–F22).

February 5–8: 8th Environmental Law (5F–F27).

February 12–16: 5th Criminal Trial Advocacy (5F–F32).

February 21–March 2: Military Lawyer's Assistant (512–71D20/50).

March 5–16: 79th Procurement Attorneys' (5F–F10).

March 5–8: 45th Senior Officer Legal Orientation (War College) (5F–F1).

March 19–23: 11th Law of War Workshop (5F–F42).

March 26–28: 3d Government Information Practices (5F–F28).

April 2–6: 46th Senior Officer Legal Orientation (5F–F1).

April 9–12: 9th Fiscal Law (5F–F12).

April 9–12: 2d Litigation (5F–F29).

April 17–19: 3d Claims (5F–F–26).

April 23–27: 9th Staff Judge Advocate Orientation (5F–F52).

April 23–May 4: 80th Procurement Attorneys' Course (5F–F10).

May 7–10: 6th Legal Assistance (5F–F23).

May 14–16: 3d Negotiations (5F–F14).

May 21–June 8: 18th Military Judge (5F–F33).

May 30–June 1: Legal Aspects of Terrorism.*

June 11–15: 47th Senior Officer Legal Orientation (5F–F1).

June 18–29: JAGSO (CM Trial).

June 21–23: Military Law Institute Seminar.

July 9–13 (Proc) and July 16–20 (Int. Law): JAOGC/CGSC (Phase VI Int. Law, Procurement).

July 9–20: 2d Military Administrative Law (5F–F20).

July 16–August 3: 19th Military Judge (5F–F33).

July 23–August 3: 81st Procurement Attorneys' Course (5F–F10).

August 6–October 5: 90th Judge Advocate Officer Basic (5–27–C20).

August 13–17: 48th Senior Officer Legal Orientation (5F–F1).

August 20–May 24, 1980: 28th Judge Advocate Officer Graduate (5–27–C22).

August 27–31: 9th Law Office Management (7A–713A).

September 17–21: 12th Law of War Workshop (5F–F42).

September 28–28: 49th Senior Officer Legal Orientation (5F–F1).

*Tentative.

3. TJAGSA Course Prerequisites and Substantive Content.

GENERAL INFORMATION

The Judge Advocate General's School is located on the north grounds of the University of Virginia at Charlottesville. The mission of the School is to provide resident and nonresident instruction in military law. The School's faculty is composed entirely of military attorneys.

THE ACADEMIC DEPARTMENT

The Academic Department develops and conducts resident and nonresident instruction. The organization of the Department includes Criminal Law, Administrative and Civil Law, Internal Law and Contract Law Divisions. Within the Department, the Nonresident Instruction Branch administers the School's correspondence course program and other nonresident instruction.

COURSES OFFERED

The Judge Advocate General's School offers a total of 31 different resident courses. The official source of information concerning courses of instruction at all Army service schools, including the Judge Advocate General's School, is the U.S. Army Formal Schools Catalog (DA Pam 351-4). Attendance by foreign military personnel is governed by applicable Army regulations. Quotas for most courses offered at The Judge Advocate General's School may be obtained through usual unit training channels. Exceptions to this policy are the Judge Advocate Officer Basic Course, Judge Advocate Officer Graduate Course, and Staff Judge Advocate Orientation Course, quotas for which are controlled by the Personnel, Plans and Training Office in the Office of The Judge Advocate General; the Military Judge Course, quotas for which are controlled by the Army Judiciary in Washington, D.C.: and the Senior Officer Legal Orientation Course, quotas for which are controlled by MILPERCEN. Inquiries concerning quotas and waivers of prerequisites should be directed to Commandant, The Judge Advocate, General's School, U.S. Army, Charlottesville, Virginia 22901, ATTENTION: Academic Department.

TABLE OF CONTENTS

*Called Procurement Attorney's Course until 1 October 1978.

JUDGE ADVOCATE OFFICER BASIC COURSE (5-27-C20)

Length: 9 weeks.
Purpose: To provide officers newly appointed in the Judge Advocate General's Corps with the Basic orientation and training necessary to perform the duties of a judge advocate.

Prerequisites: Commissioned officer who is a lawyer and who has been appointed or anticipates appointment in the Judge Advocate General's Corps or his service's equivalent. Security clearance required: None.

Substantive Content: The course stresses military criminal law and procedure and other areas of military law which are most likely to concern a judge advocate officer in his first duty assignment.

Criminal Law: Introduction to military criminal law and the practical aspects of criminal procedure and practice.

Administrative and Civil Law: Introduction to personnel law (military and civilian), legal basis of command, claims, legal assistance and Army, organization and management.

Contract Law: Introduction to the law of U.S. Government contracts.

International Law: Introduction to Law of War and Status of Forces Agreements.

JUDGE ADVOCATE OFFICER GRADUATE COURSE (5-27-C22)

Length: 40 weeks.

Purpose: To provide branch training in and a working knowledge of the duties and responsibilities of field grade Judge Advocate General's Corps officers, with emphasis on the positions of deputy staff judge advocates and staff judge advocates.

Prerequisites: Commissioned officer: Career officer of the Armed Forces whose branch is JAGC or the service's equivalent, in fourth to eighth year of active commissioned service. Army officers are selected for attendance by The Judge Advocate General.

Service Obligation: Two years.

Substantive Content: The Judge Advocate Officer Graduate Course prepares career military lawyers for future service in staff judge advocate positions. To accomplish this, the course is oriented toward graduate-level legal education comparable to the graduate programs of civilian law schools. The American Bar Association has approved the course as meeting its standards of graduate legal education. The course is conducted over a two-semester academic year totalling approximately 42 credit hours. It consists of the following curriculum elements:

1. Core Courses consisting of approximately 28 credit hours of criminal law, administrative and civil law, international law, and contract law subjects, military subjects and communications.

2. Electives presented both by The Judge Advocate General's School and the University of Virginia School of Law totaling approximately 14 credit hours.

SENIOR OFFICERS' LEGAL ORIENTATION COURSE (5F-F1)

Length: 4-½ days.

Purpose: To acquaint senior commanders with installation and unit legal problems encountered in both the criminal and civil law fields.

Prerequisites: Active duty and reserve component commissioned officers in the grade of colonel or lieutenant colonel about to be assigned as installation commander or deputy; service school commandant; principal installation commander or deputy; service school commandant; principal staff officer (such as chief of staff, provost marshal, inspector general, director of personnel) at division, brigade or installation levels; or as a brigade of commander. As space permits, those to be assigned as battalion commanders may attend. Security clearance required: None.

Substantive Content: Administrative and Civil Law: Judicial review of military activities, military aid to civil authorities, installation management, labor-management relations, civilian

personnel law, military personnel law, nonappropriated funds, civil rights, legal assistance, claims and government information practices. Criminal Law: Survel principles relating to search and seizure, confessions, and nonjudicial punishment. Emphasis is placed on the options and responsibilities of convening authorities before and after trial in military justice matters, including the theories and practicabilities of sentencing. International Law: Survey of Status of Forces Agreements and Law of War. Procurement Law: Survey of the Anti-Deficiency Act.

CONTRACT ATTORNEYS' COURSE (5F-F10)

Length: 2 weeks.

Purpose: To provide basic instruction in the legal aspects of government procurement at the installation level. Completion of this course also fulfills one-half of the requirements of Phase VI of the nonresident/resident Judge Advocate Officer Graduate Course and covers one-half of the material presented in the USAR School Judge Advocate Officer Graduate Course ADT Phase VI.

Prerequisites: Active duty or reserve component military attorneys or appropriate civilian attorneys employed by the U.S. Government, with six months' or less procurement experience. Security clearance required: None.

Substantive Content: Basic legal concepts regarding the authority of the Government and its personnel to enter into contracts; contract formation (formal advertising and negotiation), including appropriations, basic contract types, service contracts, and socio-economic policies; contract performance, including modifications; disputes, including remedies and appeals.

CONTRACT ATTORNEYS' ADVANCED COURSE (5F-F11)

Length: 1 week.

Purpose: To provide continuing legal education and advanced expertise in the statutes and regulations governing government procurement. To provide information on changes at the policy level.

Prerequisites: Active duty or reserve component military attorneys or appropriate civilian attorneys employed by the U.S. Government. Applicants must have successfully completed the Contract Attorneys' Course (5F-F-10), or equivalent training, or have at least one year's experience as a procurement attorney. Security clearance required: None.

Substantive Content: Advanced legal concepts arising in connection with the practical aspects of contracting, funding, competitive negotiation, socio-economic policies, government assistance, state and local taxation, modifications, weapons system acquisition, truth in negotiations, terminations, labor relations problems, contract claims, and litigation. Course will normally be theme oriented to focus on a major area of procurement law. Intensive instruction will include current changes in the laws, regulations and decisions of courts and boards. The 9th Contract Attorneys' Course Theme deals with contract formations with emphasis on socio-economic policies and other legislation.

FISCAL LAW COURSE (5F-F12)

Length: 3-½ days.

Purpose: To provide a basic knowledge of the laws and regulations governing the obligation and expenditure of appropriated funds and an insight into current fiscal issues within the Department of the Army. The course covers basic statutory constraints and administrative procedures involved in the system of appropriation control and obligation of funds within the Department of Defense. This course emphasizes the methods contracting officers and legal and financial personnel working together can utilize to avoid over-obligations.

Prerequisites: Active duty commissioned officer of an armed force, or appropriate civilian employee of the U.S. Government actively engaged in procurement law, contracting or ad-

ministering funds available for obligation on procurement contracts. Must be an attorney, contracting officer, comptroller, Finance & Accounting Officer, Budget Analyst or equivalent. Attendees should have completed TJAGSA Contract Attorneys' Course, a financial manager's course, a comptrollership course or equivalent.

Substantive Content: Practical legal and administrative problems in connection with the funding of government contracts. Basic aspects of the appropriations process, administrative control of appropriated funds, the Anti-Deficiency Act, Industrial and Stock Funds, and the Minor Construction Act will be covered.

ALLOWABILITY OF CONTRACTS COSTS COURE (5F-F13)

Length: 2-½ days.

Purpose: The Allowability of Contract Costs Course is a basic course designed to develop an understanding of the nature and means by which the Government compensates contractors for their costs. The course focuses on three main areas: (1) basic accounting for contract costs; (2) the Cost Principles of ASPR §15; and (3) the Cost Accounting Standards Board and the Costs Accounting Standards. The course is a mixture of lectures and panel discussions aimed at covering substantive and practical issues of contract costs. This course is not recommended for attorneys who are experienced in application of cost principles.

Prerequisites: Active duty or reserve component military attorney or appropriate civilian attorney employed by the U.S. Government, with at least one year of procurement experience. Applicants must have successfully completed the Contract Attorneys' Course (5F-F10) or equivalent.

Substantive Content: This introductory course will focus on three main areas: functional cost accounting terms and application, the Cost Principles, and Cost Accounting Standards.

NEGOTIATIONS COURSE (5F-F14)

Length: 2-½ days.

Purpose: The Negotiations Course is designed to develop advanced understanding of the negotiated competitive procurement method. The course focuses on the attorney's role in negotiated competitive procurement, including: (1) when and how to use this method; (2) development of source selection criteria; (3) source selection evaluation process; (4) competitive range; (5) oral and written discussions; and (6) techniques.

Prerequisites: Active duty or reserve component military attorney or appropriate civilian attorney employed by the U.S. Government, with at least one, but not more than five years of procurement experience. Applicants must have successfully completed the Contract Attorneys' Course (5F-F10) or equivalent. Security clearance required: None.

Substantive Content: The course will focus on solicitation and award by negotiation including selection of the procurement method, use of the negotiation process in the development of source selection, discussion and techniques.

CONTRACT ATTORNEYS' WORKSHOP (5F-F15)

Length: 2 days.

Purpose: The workshop provides an opportunity to examine, in the light of recent developments, and discuss in depth current procurement problems encountered in installation SJA offices. Attorneys will be asked to submit problems in advance of attendance. These will be collected, researched and arranged for seminar discussion under the direction of the Contract Law faculty.

Prerequisites: Active duty or reserve component military attorneys or appropriate civilian attorneys employed by the U.S. Government with not less than 12 months' procurement experience who are currently engaged in the

practice of procurement law at installation level. Security clearance required: None.

Substantive Content: Discussion of current developments in procurement law and their application to the problems currently experienced in installation level procurement.

MILITARY ADMINISTRATIVE LAW COURSE (5F-F20)

Length: 2 weeks.

Purpose: To provide a working knowledge of selected subjects in the area of administrative law. (Students may attend either the week of personnel law instruction or the week of legal basis of command instruction, or both.) This course is specifically designed to fulfill one-half of the reserve requirements of Phase IV of the nonresident/resident Judge Advocate Officer Graduate Course. It also covers one-half of the material presented in the USAR School Judge Advocate Officer Graduate Course ADT Phase IV.

Prerequisites: Active duty or reserve component military attorney, 02-04, or appropriate civilian attorney employed by the U.S. Government. Although appropriate for active duty personnel, enrollment is not recommended unless the individual is working toward completion of the Graduate Course by correspondence. Security clearance required: None.

Substantive Content: Personnel Law: Basic concepts of personnel law and judicial review of military activities: Statutes, regulations and court decisions relating to military personnel law, boards of officers, civilian personnel law, labor-management relations and federal review of military activities. Legal Basis of Command: Statutes, regulations and court decisions relating to the control and management of military installations and nonappropriated funds, environmental law, military assistance to civil authorities, and criminal and civil liabilities of military personnel.

CIVIL LAW COURSE (5F-F21)

Length: 2 weeks.

Purpose: To provide a working knowledge of legal assistance and claims. (Students may attend either the week of claims instruction or the week of legal assistance instruction, or both.) This course is specifically designed to fulfill one-half of the requirements of Phase IV of the nonresident/resident Judge Advocate Officer Graduate Course. It also covers one-half of the material presented in the USAR School Judge Advocate Officer Graduate Course ADT Phase IV.

Prerequisites: Active duty or reserve component military attorney, 02-04, or appropriate civilian attorney employed by the U.S. Government. Although appropriate for active duty personnel, enrollment is not recommended unless the individual is working toward completion of the Graduate Course by correspondence. Security clearance required: None.

Substantive Content: Legal Assistance: Statutes, regulations, and court decisions which affect members of a military community, including personal finances, consumer protection, family law, taxation, survivor benefits, civil rights, and state small claims procedures. Claims: Statutes, regulations and court decisions relating to the Military Personnel and Civilian Employees Claims Act, Military Claims Act, Army National Guard Claims Act, Federal Tort Claims Act and claims in favor of the Government.

FEDERAL LABOR RELATIONS COURSE (5F-F22)

Length: 4-½ days.

Purpose: To provide a basic knowledge of personnel law pertaining to civilian employees, and labor-management relations.

Prerequisites: Active duty or reserve component military attorney or appropriate civilian attorney employed by the U.S. Government.

Reserve officers must have completed the Judge Advocate Officer Graduate Course. Although appropriate for reservists, enrollment is not recommended unless the individual is working in the area covered by the course. Persons who have completed this course within the past two-year period immediately preceding the date of this course are not eligible to attend. Security clearance required: None.

Substantive Content: Law of Federal Employment: Hiring, promotion and discharge of employees under the FPM and CPR; role of the Civil Service Commission; procedures for grievances, appeals and adverse actions; personal rights of employees; and equal employment opportunity complaints. Federal Labor-Management Relations: Rights and duties of management and labor under Executive Order 11491, as amended, and DOD Directive 1426.1; representation activities; negotiation of labor contracts; unfair labor practice complaints; administration of labor contracts and procedures for arbitration of grievances. Government Contractors: An overview of the responsibility of military officials when government contractors experience labor disputes.

LEGAL ASSISTANCE COURSE (5F-F23)

Length: 3-½ days.

Purpose: A survey of current problems in Army legal assistance providing knowledge of important legal trends and recent developments involved in areas of legal assistance rendered to service members.

Prerequisites: Active duty or reserve component military attorney or appropriate civilian attorney employed by the U.S. Government. Reserve officers must have completed the Judge Advocate Officer Graduate Course. Although appropriate for reservists, enrollment is not recommended unless the individual is working the area covered by the course. The student is expected to have experience in the subject area or have attended the Basic or Graduate Course. Security clearance required: None.

Substantive Content: New developments in the areas of legal assistance rendered military personnel including consumer protection, family law, state and federal taxation, civil rights, survivor benefits, bankruptcy, and small claims. The instruction is presented with the assumption that students already have a fundamental knowledge of legal assistance.

MILITARY ADMINISTRATIVE LAW DEVELOPMENTS COURSE (5F-F25)

Length: 4 days.

Purpose: To provide knowledge of important legal trends and recent developments in military administrative law, judicial review of military actions, and decisions relating to the operation of military installations.

Prerequisites: Active duty or reserve component military attorney or appropriate civilian attorney employed by the U.S. Government. Reserve officers must have completed the Judge Advocate Officer Graduate Course. Although appropriate for reservists, enrollment is not recommended unless the individual is working in the area covered by the course. The student is expected to have experience in the subject area. Security clearance required: None.

Substantive Content: New developments in the areas of military administrative law including military personnel, civilian personnel, military assistance to civil authority, legal basis of command (military installation law) and nonappropriated funds, with particular emphasis on developing case law in the areas of administrative due process, vagueness, and constitutionality of regulations, including first and fourteenth amendment considerations. Developments in the area of judicial review of military activities, including procedures for control and management of litigation involving the Army is required by AR 27-40. The instruction is presented with the assumption that students already have a fundamental knowledge of the areas covered.

CLAIMS COURSE (5F-F26)

Length: 3 days

Purpose: To provide advanced continuing legal education in the Army Claims System, including recent judicial decisions and statutory and regulatory changes affecting claims.

Prerequisites: U.S. Army active duty or reserve component attorney or appropriate civilian attorney employed by the Department of the Army. Reserve officers must have completed the Judge Advocate Officer Graduate Course. Although appropriate for reservists, enrollment is not recommended unless the individual is working in the area covered by the course. The student is expected to have experience in the subject area. Persons who have completed this course within the past two-year period immediately preceding the date of this course are not eligible to attend. Security clearance required: None.

Substantive Content: Claims against the government. Analysis of claims relating to Military Personnel and Civilian Employees Claims Act, Federal Tort Claims Act, National Guard Claims Act, Foreign Claims Act, and Nonscope Claims Act. Recent developments in foregoing areas will be emphasized. Claims in favor of the Government. Analysis of Federal Claims Collection Act and Federal Medical Care Recovery Act with emphasis on recent developments.

ENVIRONMENTAL LAW COURSE (5F-F27)

Length: 3-½ days.

Purpose: To provide instruction in the basic principles of environmental law as they affect federal installations and activities.

Prerequisites: Active duty or reserve component military lawyer or appropriate civilian attorney employed by the U.S. Government. Reserve officers must have completed the Judge Advocate Officer Basic Course. Security clearance required: None.

Substantive Content: Basic principles of environmental law as it applies to military installations, including the National Environmental Policy Act and its requirement for preparation of environmental impact statements, the Clean Air Act, and the Federal Water Pollution Control Act. The course also includes a brief discussion of other environmental laws and the roles of the Environmental Protection Agency and the Army Corps of Engineers in environmental regulation.

GOVERNMENT INFORMATION PRACTICES COURSE (5F-F28)

Length: 2-½ days.

Purpose: To provide basic knowledge of the requirements of the Freedom of Information Act and the Privacy Act. This course is designed primarily for practicing military lawyers in the field.

Prerequisites: Active duty or reserve component military lawyer or appropriate civilian attorney employed by the U.S. Government. Reserve officers must have completed the Judge Advocate Officer Basic Course. Persons who have completed this course within the two-year period immediately preceding the date of this course are not eligible to attend. Security clearance required: None.

Substantive Content: The disclosure requirements of the Freedom of Information Act; the exemptions from disclosure and their interpretation by the federal courts; the restrictions on the collection, maintenance, and dissemination of personal information imposed by the Privacy Act; the relationship between the two Acts and their implementation by the Army.

LITIGATION COURSE (5F-F29)

Length: 3-½ days.

Purpose: To provide basic knowledge and skill in handling litigation against the United States

and officials of the Department of Defense in both their official and private capacities.

Prerequisites: Activity duty military lawyer or civilian attorney employed by the Department of Defense. Enrollment is not recommended unless the individual is responsible for monitoring, assisting or handling civil litigation at his or her installation. Anyone who has completed the Army Judge Advocate Officer Graduate Course (resident) within two years of the date of this course is ineligible to attend. Persons who have completed this course within the past two-year period immediately preceding the date of this course are not eligible to attend. Security clearance required: None.

Substantive Content: The following areas will be covered: Reviewability and justiciability, federal jurisdiction and remedies, scope of review of military activities, exhaustion of military remedies, Federal Rules of Civil Procedure, civil rights litigation, FTCA litigation, and official immunity. There will be a practical exercise in the preparation of litigation reports and pleadings.

MILITARY JUSTICE I COURSE (5F-F30)

Length: 2 weeks.

Purpose: To provide a working knowledge of the duties and responsibilities of field grade Judge Advocate General's Corps officers in the area of military criminal law. This course is specifically designed to fulfill approximately one-half of the requirements of Phase II of the nonresident/resident Judge Advocate Officer Graduate Course. It also covers approximately one-half of the materials presented in the USAR School Judge Advocate Officer Graduate Course ADT Phase II.

Prerequisites: Active duty or reserve component military attorney, 02-04. Although appropriate for active duty personnel, enrollment is not recommended unless the individual is working toward completion of the Graduate Course by correspondence. Security clearance required: None.

Substantive Content: Evidentiary aspects of military criminal law practice, including; scientific evidence, confrontation, compulsory process, right to counsel, federal and common law rules of evidence, search and seizure, self incrimination, identification, substantive law of offenses and defenses, and topical aspects of current military law.

MILITARY JUSTICE II COURSE (5F-F31)

Length: 2 weeks.

Purpose: To provide a working knowledge of the duties and responsibilities of field grade Judge Advocate General's Corps officers in the area of military criminal law. This course is specifically designed to fulfill one-half of the requirements of Phase II of the nonresident/resident Judge Advocate Officer Graduate Course. It also covers one-half of the material presented in the USAR School Judge Advocate Officer Graduate Course ADT Phase II.

Prerequisites: Active duty or reserve component military attorney, 02-04. Although appropriate for active duty personnel, enrollment is not recommended unless the individual is working toward completion of the Graduate Course by correspondence. Security clearance required: None.

Substantive Content: Procedural aspects of military criminal law, including; administration of military criminal law, jurisdiction, pleadings, motions, pleas, preliminary investigations and reports, court-martial personnel, trial procedures, post trial review and procedures, extraordinary writs, appellate review, professional responsibility, and topical aspects of current military law.

CRIMINAL TRIAL ADVOCACY COURSE (5F-F32)

Length: 4-½ days.

Purpose: To improve and polish the experienced trail attorney's advocacy skills.

Prerequisites: Active duty military attorney certified as counsel under Article 27b(2), UCMJ, with at least six months' experience as a trial attorney.

Substantive Content: Intensive instruction and exercises encompass problems confronting trial and defense counsel from pretrial investigation through appellate review. Issues in evidence, professional responsibility, procedure, trial advocacy, and topical aspects of current military law are considered.

MILITARY JUDGE COURSE (5F-F33)

Length: 3 weeks.

Purpose: To provide military attorneys advanced schooling to qualify them to perform duties as full-time military judges at courts-martial.

Prerequisites: Active duty or reserve component military attorneys. Security clearance required: None. Army officers are selected for attendance by The Judge Advocate General.

Substantive Content: Trial procedure, substantive military criminal law, defenses, instructions, evidence, current military legal problems, and professional responsibility.

DEFENSE TRIAL ADVOCACY COURSE (5F-F34)

Length: 4-½ days.

Purpose: To improve and polish the experienced trial attorney's defense advocacy skills.

Prerequisites: Active duty military attorney certified as counsel under Article 27b(2), UCMJ, with 6-12 months' experience as a trial attorney and with present or prospective immediate assignment as a defense counsel at the trial level. Security clearance required: None.

Substantive Content: Intensive instruction, keyed to defense counsel's needs, encompass problems from pretrial investigation through appellate review. Issues in evidence, professional responsibility, procedure, trial advocacy and topical aspects are considered.

CRIMINAL LAW NEW DEVELOPMENTS (5F-F35)

Length: 3 days.

Purpose: To provide counsel and criminal law administrators with information regarding recent developments and trends in military criminal law. This course is revised annually.

Prerequisites: This course is limited to active duty judge advocates and civilian attorneys who serve as counsel or administer military criminal law in a judge advocate office. Students must not have attended TJAGSA resident criminal law CLE, Basic or Graduate courses, within the 12-month period immediately preceding the date of the course.

Substantive Content: Government/defense counsel post trial duties; Speedy trial; pretrial agreements; extraordinary writs; 5th Amendment and Article 31; search and seizure; recent trends in the United States Court of Military Appeals; Jurisdiction; witness production; mental responsibility; military corrections; pleadings; developments in substantive law; topical aspects of current military law.

INTERNATIONAL LAW I COURSE (5F-F 40)

Length: 2 weeks.

Purpose: To provide knowledge of the sources, interpretation and application of international law. This course fulfills approximately one-third of the requirements of phase VI of the nonresident/resident Judge Advocate Officer Graduate Course. It also covers approximately one-third of the materials presented in the USAR School Judge Advocate Officer Graduate Course ADT Phase VI.

Prerequisites: Active duty or reserve component military attorney, 02-04, or appropriate

civilian attorney employed by the U.S. Government. Enrollment of active duty personnel is not recommended unless the individual is working toward completion of the Graduate Course by correspondence. Security clearance required: None.

Substantive Content: The International Legal System: nature, sources and evidences of international law; state rights and responsibilities; recognition; nationality; international agreements; the United Nations and the International Court of Justice; international rules of jurisdiction; status of forces agreements, policies, practices and current developments; foreign claims operations overseas procurement operations; and private aspects of international law.

INTERNATIONAL LAW II COURSE (5F-F41)

Length: 2 weeks.

Purpose: To provide familiarization with the law of war, including customary and conventional (Hague and Geneva Conventions) laws, and the national and international legal rules affecting military operations during times of peace, of armed conflict and of occupation. This course fulfills approximately one-third of the requirements of Phase VI of the nonresident/resident Judge Advocate Officer Graduate Course. It also covers approximately one-third of the materials presented in the USAR School Judge Advocate Officer Graduate Course ADT Phase VI.

Prerequisites: Active duty or reserve component military attorney, 02-04, or appropriate civilian attorney employed by the U.S. Government. Enrollment of active duty personnel is not recommended unless the individual is working toward completion of the Graduate Course by correspondence. Security clearance required: None.

Substantive Content: International customs and treaty rules affecting the conduct of U.S. Military Forces in military operations in all levels of hostilities; the Hague and Geneva Conventions and the General Protocols, and their application in military operations and missions, to include problems on handling of war crimes, control of civilians, Article 5 tribunals for the classification of prisoners of war; occupation and civil affairs matters; law of war training and the Code of Conduct.

LAW OF WAR WORKSHOP (5F-F42)

Length: 4-½ days.

Purpose: To provide both judge advocate and non-judge advocate officers with basic knowledge of the law of war and of the major changes now impending in this field and of the practical aspects of law of war instruction.

Prerequisites: Active duty or reserve component military attorney or appropriate civilian attorney employed by the Department of Defense, as well as non-attorney officers with command experience who are to be involved in any aspect or level of the law of war training process. Preferably, attorneys and non-attorney officers should attend the workshop as a teaching team. However, organizations wishing to qualify either attorneys or command experienced officers in the law of war training process may send one or a number of unpaired designees. Security clearance required: None.

Substantive Content: International customs and treaty rules affecting the conduct of forces in military operations in all levels of hostilities, the Hague and Geneva Conventions and their application in military operations, to include problems on reporting and investigating war crimes; treatment and control of civilians; treatment and classification of prisoners of war; the substantial change to the law of war impending as a result of the recent adoption in Geneva of the Protocols additional to the 1949 Geneva Conventions, including extensive new obligations of commanders and military attorneys. Practical emphasis is given to preparation of lesson plans, methods of instruction, and use of law of war training materials. Participation in team teaching exercises is required.

LEGAL ASPECTS OF TERRORISM (TENTATIVE) (SF-F43)

Length: 2-½ days.

Purpose: To provide knowledge of the legal aspects of terrorism and antiterrorism, focusing on the questions confronting military commanders both in the United States and overseas concerning terrorism and the legality of counter terrorism measures.

Prerequisites: Active duty or Reserve Component military attorney or appropriate civilian attorney employed by the U.S. Government. Security clearance required: Secret.

Substantive Content: What is the terrorism problem, and what measures are being contemplated to counter it both within and outside the United States; relevant international law and agreements, and national legislation in regard to terrorism; the use of force and limitations on the use of force in foreign countries; legal rules applicable to terrorism during armed conflict; counter terrorism authority of U.S. commanders overseas; the use of force to counter terrorism within the United States both on and off federal installations; the Posse Comitatus Act; relationships within DOD, with federal or local agencies outside DOD, and in regard to other states.

STAFF JUDGE ADVOCATE ORIENTATION COURSE (5F-F52)

Length: 4-½ days.

Purpose: To inform newly assigned staff judge advocates of current trends and developments in all areas of military law.

Prerequisites: Active duty field grade Army judge advocate whose actual or anticipated assignment is as a staff judge advocate or deputy staff judge advocate of a command with general court-martial jurisdiction. Security clearance required: None.

Selection for attendance is by the Judge Advocate General.

Substantive Content: Major problem areas and new developments in military justice, administrative and civil law, procurement, and international law.

LAW OFFICE MANAGEMENT (7A-713A)

Length: 4-½ days.

Purpose: To provide a working knowledge of the administrative operations of a staff judge advocate office and to provide basic concepts of effective law office management to military attorneys, warrant officers, and senior enlisted personnel.

Prerequisites: Active duty or reserve component JAGC officer, warrant officer or senior enlisted personnel in grade E-8/E-9 in any branch of the armed services. Persons who have completed this course or the Graduate Course within the *three-year period* preceding the date of this course are not eligible to attend. Officers who have been selected for Graduate Course attendance also are ineligible to attend. Security clearance required: None.

Substantive Content: Management theory including formal and informal organizations, motivation and communication. Law office management techniques, including effective management of military and civilian personnel and equipment, and control of budget and office actions.

MILITARY LAWYER'S ASSISTANT COURSE (512-71D/20/50)

Length: 7-½ days.

Purpose: The course provides essential training in the law for legal clerks and civilian employees who work as professional assistants to Army judge advocate attorneys. The course is specifically designed to meet the needs of the Army legal clerk, MOS 71D, for skill level three training in paralegal duties.

Prerequisites: The course is open only to enlisted service members and civilian employees

who are serving as paraprofessionals in a military legal office, or whose immediate future assignment entails providing professional assistance to an attorney. Students must have served a minimum of one year in a legal clerk/legal paraprofessional position and must have satisfactorily completed the Law for Legal Clerks Correspondence Course.

Substantive Content: The course focuses on Army legal practice, with emphasis on the client service aspects of legal assistance and criminal law. The course builds on the prerequisite foundation of field experience and correspondence course study. Coverage includes administrative procedures; legal assistance areas of family law, consumer protection, landlord-tenant and taxation; military criminal law areas of crimes and defenses, role of court personnel, jurisdiction, pretrial procedures and evidence; legal research; written communication; interviewing techniques; and professional responsibility.

JAGC PERSONNEL SECTION

PPTO, OTJAG

1. Change in policy concerning the submission and filing of letters of communication to DA officer and enlisted promotion selection boards.

The Military Personnel Center (MILPERCEN) has announced the following procedures:

1. Current procedures permit officers in the primary zone of consideration and senior enlisted personnel in the primary and secondary zones of consideration to communicate directly by letter to presidents of centralized promotion boards. In addition, current procedures allow any party to write a letter to a selection board recommending an enlisted member for promotion. All such letters considered by boards are subsequently filed in the Official Military Personnel File (OMPF).

2. Procedures are being changed to provide that letters of recommendation for promotion concerning enlisted personnel will be restricted to soldiers in the primary zone and accepted only from their current chain of command/supervision.

3. Effective 1 August 1978, only letters from officer and enlisted personnel in the primary zones of consideration will be accepted.

4. Effective 1 August 1978, AR 640-10 will prohibit the filing of all such letters in the OMPF. These letters, to include inclosures, will be considered as privileged correspondence for board purposes only and will be filed with the record of board proceedings maintained by MILPERCEN.

5. Letters of communication and recommendation for promotion should not be forwarded to MILPERCEN in care of the president of the appropriate board until the HQDA message announcing the zone of consideration is dispatched.

6. In the past, some members used letters of communication to promotion selection boards as a means to insure that documents of career importance are added to their OMPF. This means of filing update is no longer available. Therefore, OMPF material will not be attached to communications addressed to the promotion selection board but will be submitted through the local military personnel office (MILPO). A special records section has been established within the Officer Personnel Records Branch in MILPERCEN and at the Enlisted Records and Evaluation Center, Fort Benjamin Harrison, to expeditiously process on a priority basis OMPF updated for personnel in the primary zone of consideration. Documents for officer OMPF update should be sent to Commander, MILPERCEN ATTN: DAPC-PSR-RP, 200 Stovall Street, Alexandria, VA 22332. Documents pertaining to enlisted personnel should be sent to Commander, Enlisted Records and Evaluation Center, ATTN: PCREXX, Fort Benjamin Harrison, IN 46216. A letter of transmittal indicating name, grade, social security number and

the identification of the selection board by which the individual is being considered should be used. Documents pertaining to personnel not in a primary zone of consideration should continue to be forwarded by the MILPO in accordance with current procedures. Additionally, only those documents authorized for file by AR 640-10 will be accepted, processed, and forwarded to promotion selection boards.

2. Assignments.

NAME	*FROM*	*TO*
	COLONELS	
Hammack, Ralph	USALSA, WASH, DC	USALSA w/duty sta Yongsan, Korea
	LIEUTENANT COLONELS	
Coleman, Gerald	APG, MD	2d Armd Div, Germany
Hanft, John	USALSA, WASH, DC	USALSA w/duty sta Ft. Belvoir, VA
Steward, Ronald	Ft. Riley, KS	USALSA w/duty sta Nurnberg, Germany
Wilson, Norman	Ft. Leonard Wood, MO	USALSA w/duty sta Ft. Leavenworth, KS
	MAJORS	
Bogan, Robert	Korea	Okinawa
Cruden, John,	USAREUR	OTJAG, WASH, DC
Fulbruge, Charles	Ft. Ord, CA	8th Army, Korea
Kittel, Robert	Hawaii	AFIP, WASH, DC
Linebarger, Jan	OTJAG, WASH, DC	VII CORPS, APO NY
Millard, Arthur	Presidio of SF	Ft. McPherson, GA
	CAPTAINS	
Baldwin, William	Ft. Ben Harrison, IN	88th Basic Class, TJAGSA
Barbee, John	Korea	Ft. Houston, TX
Blomstrom, John	USAREUR	Ft. Houston, TX
Bornhorst, David	Ft. Jackson, SC	27th Advanced Course, TJAGSA
Bowe, Thomas	USAREUR	Korea
Bragaw, Rexford	USAREUR	USALSA, Bailey Crossroads, VA
Bressler, Stephen	USAREUR	Ft. Houston, TX
Brunson, Frank	Ft. Hood, TX	S&F TJAGSA
Caldwell, Joe	USAREUR	USALSA, Bailey Crossroads, VA
Camblin, Edward	Ft. Hood, TX	Korea
Cornelison, Joseph	Ft. Ben Harrison, IN	87th Basic Course, TJAGSA
Dontonio, Gregory	Korea	Ft. Huachuca, AZ
Ferraro, Peter	Ft. Hood, TX	USALSA, WASH, DC
Flanigan, Richard	USAREUR	S&F, USMA

NAME	FROM	TO
Gallaway, Robert	USAREUR	USALSA, WASH, DC
Gibson, Fred	Ft. Polk, LA	USALSA, WASH, DC
Goforth, Charles	S&F, TJAGSA	Space & Bld Mgt, DSSW WASH, DC
Keating, Everet	Ft. Carson, CO	USALSA, WASH, DC
Keefe, Thaddeus	Korea	Ft. Houston, TX
Monahan, Eugene	Korea	Ft. Belvoir, VA
Mora, Raul	USACC, APO CA	Southport, NC
Perrault, Donald	USAREUR	USALSA, WASH, DC
Pupko, Walter	Ft. Campbell, KY	Korea
Raymond, William	Korea	Ft. Ord, CA
Reade, Robert	Korea	Ft. Bragg, NC
Roup, Rolland	Ft. Lewis, WA	USALSA, WASH, DC
Rutter, Mark	Ft. Polk, LA	EUCOM SPT ACT, IRAN
Scholz, Steven	Korea	Presidio of SF
Smith, Gary	Ft. Gordon, GA	Korea
Spitz, Terry	USAREUR	USALSA, WASH, DC
Suessmann, Michael	USAREUR	St. Louis, MO
Thiele, Alan	Korea	Ft. Sheridan, IL
Trudo, Martha	Korea	Ft. Hood, TX
Vangoor, Stephen	Alaska	Korea
Wheeler, Courtny	USAREUR	USALSA, WASH, DC
Winter, Marion	Canal Zone	Ft. Meade, MD
Wolski, James	Ft. Sheridan, IL	Korea
Zimmerman, John	Ft. Ord, CA	Korea
	WARRANT OFFICERS	
Bailey, Dennis	Aberdeen Proving Grounds, MD	Ft. Gordon, GA
Betteridge, Kenneth	Ft. Sill, OK	Hawaii
Hall, William	USAREUR	Ft. Rucker, AL

3. Legal clerks and court reporters in grade E-6 (SSG or SP6) selected for participation in Advanced Noncommissioned Officers' Education System.

MOS 71D

Aschutz, Michael A.
Brooks, Clifford T.
Bornasrovira, C.
Bradshaw, Robert L.
Carson, Billy Joseph
Colley, Thomas B.
Dunhan, William J.
Farmer, Charles D.
Gahan, Gibson W.
Hutchins, Herman C
Jose, Dalton Dale
Long, Joe, Jr.
Mackay, Edward
McCarl, William R.
McElyea, Jimmy E.
McQuigg, William D.
Morlang, Wesley W.
Nimmo, Richard W.
Pagel, Walter W.
Perkins, Stephen P.
Phillips, Ronald E.
Pollard, Darrell O.
Rowland, Steven, S.
Sanders, Needham S.
Shaw, Charles B.
Speer, Jeffrey M.
Thiel, James M.
Welder, Russel
Welsh, Michael J.
Whittington, Eddie

MOS 71E

Andre, Robert J.
Anthony, Robert L.
Bryant, Terry W.
Caldwell, William D.
Dimato, Marylin C.
Hughley, Linda M.
Lewis Paul
McArthur, Lawrence
Olsen, Janice G.
Penvose, Thomas L.

Current Materials of Interest

Articles and Comments

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Michael H. Graham, *The Confrontation Clause, the Hearsay Rule and the Forgetful Witness*, 56 TEX. L. REV. 151 (1978).

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Benjamin A. Sims, *Soviet Military Law: Judicial and Non-Judicial Punishment*, 13 NEW ENG. L. REV. 381 (1978).

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L. Stein, *Recent Developments: Federal Gift Tax and Estate Tax-Interest-Free Loans—Intrafamily Interest—Free Loans are not Taxable Transfers for Purposes of I.R.C § 2501.* Crown v. Commissioner *(T.C. 1977)*, 23 VILL. L. REV. 625 (1978).

Kathryn Taylor, *Equal Credit for All: An Analysis of the 1976 Amendments to the Equal Credit Opportunity Act*, 1978 WISC. L. REV. 326.

Edwin Vieira, Jr., *Are Public-Sector Unions Special Interest Political Parties?* 27 DEPAUL L. REV. 293 (1978).

By Order of the Secretary of the Army:

BERNARD W. ROGERS
General, United States Army
Chief of Staff

Official:

J. C. PENNINGTON
Brigadier General, United States Army
The Adjutant General

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